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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10295

Agenda No. 6.

Allen B. Piper, Individually and as Co-
Executor of the Last Will and Testament
of Louis A. Piper, Deceased, et al.,
Plaintiffs,

Glenn H. Barr, Conservator of the Estate of
Allen B. Piper, Incompetent, Louisa I. Piper,
Allen L. Piper, and Carolyn Marie Curl,
Plaintiffs-Appellants,

Appeal from the
Circuit Court of
Edgar County

vs.
Harry K. Piper, Individually and as Co-
Executor of the Last Will and Testament of
Louis A. Piper, Deceased, Florence Piper,
Karen Piper and The Edgar County National
Bank of Paris, Trustee under the Last Will
and Testament of Louis A. Piper, Deceased,
Defendants-Appellees.

REYNOLDS, J.

The case involves the construction of a will. The appeal is taken from a decree entered by the trial court finding that certain notes owed by one of the testator's sons to the Edgar County National Bank of Paris which the testator signed as an accommodation party, were not excused, forgiven or cancelled by the terms of the will. The plaintiffs appeal.



Louis A. Piper died testate on July 16, 1955, and by his will he appointed the Edgar County National Bank of Paris, as trustee of the estate, and requested the appointment of his two sons as executors. The two sons were Allen B. Piper, one of the plaintiffs, and Harry K. Piper, one of the defendants. The wives and children of Allen B. Piper and Harry K. Piper are parties to this suit, but since their rights are contingent, we will consider only the rights of the sons in this opinion and Allen B. Piper will be designated the plaintiff and Harry K. Piper the defendant. During the pendency of this cause, Allen B. Piper has become incompetent, and Glenn H. Barr, Conservator for the Estate of Allen B. Piper, Incompetent, is now acting and is substituted for Allen B. Piper, but both Allen B. Piper and Glenn H. Barr will be designated as the plaintiff..

At the time of his death, Louis A. Piper was an accomodation maker on three notes to the Edger County National Bank of Paris, one in the amount of \$10,600.00, dated April 27, 1955, one in the amount of \$3400.00, dated June 11, 1955, and one in the amount of \$700.00, dated June 11, 1955. The notes were signed "Paris Foundry & Machine Works", and by A. B. Piper and L. A. Piper. It is not disputed that A. B. Piper was Allen B. Piper and the L. A. Piper was Louis A. Piper. The business name "Paris Foundry & Machine Works" was neither a corporation nor a partnership, but was merely

the name and style under which the said Allen B. Piper, as an individual, conducted his business.

The will was probated and Allen B. Piper and Harry K. Piper were appointed and qualified as co-executors of the will. Later, the Edgar County National Bank of Paris filed its claims for the three notes, the claims were allowed and because of this indebtedness the question in this cause arose. By the terms of the will it was provided that debts, obligations or claims of the testator against his two sons were forgiven in the following language:

"5. I will any and all debts, obligations or claims that I may have against either of my sons be cancelled and held for naught, and in the event that either of my said sons shall owe me or my estate any sums of money, he shall not be required to pay the same."

Although the testimony shows that Louis A. Piper did not receive any of the money represented by the notes to the bank, and all money received from the notes was used by and was for the benefit of the son Allen B. Piper, Louis A. Piper was a primary obligor on these notes. In the absence of the provision of the will, there could be no question that the estate of Louis A. Piper,

Deceased, had a good and valid claim for recompense from the son Allen B. Piper. The will left the estate, subject to the trust, to the two sons in equal shares. It is the contention of the plaintiff Allen B. Piper that Paragraph No. 5 of the will cancelled such an obligation, and the contention of the defendant Harry K. Piper that such obligation was not cancelled.

The notes themselves were renewals of previous notes made by Allen B. Piper with Louis A. Piper as accommodation maker, but it is conceded that the originals of the notes and the renewals were not in existence at the time of the making of the will. The testimony and exhibits showed that approximately fifty other notes ranging in time from 1942 to 1950 were made to the same bank, all signed the same way, namely, Paris Foundry & Machine Works with the signature of A. B. Piper and L. A. Piper. The trial court admitted these other notes "for the sole purpose of showing a course of dealing". In the trial court's "Memorandum Opinion" he speaks of the will as having been executed some three years before the three notes in question originated. This statement is questioned by the plaintiff, but this court does not regard this question as too important. It is unquestioned that the notes in question were executed after the will was made.

In the trial of this case, many facts were stipulated and there is little, if any, evidence that is in question. Mr. Lucas, the banker, was a bit vague as to some matters, but they do not seem important. He did identify the signatures, the notes in question and the notes made before 1950, and stated in all cases the consideration for the notes was transferred to the account of the Paris Foundry & Machine Works and that none of this money was ever paid over to or received by Louis A. Piper. There was testimony by Mary Weger, who looked after Louis A. Piper some time in 1950 as a nurse and housekeeper, but her testimony is only to the effect that she saw Allen B. Piper at his father's home almost every day and that a few times he took his father with him on trips. James Peters, an employee at the foundry testified he saw the father there several times, and that some times he would paint articles for the firm and do some sawing. Both this witness and Mary Weger stated they also saw the other son, Harry K. Piper visit his father from time to time. In the opinion of this court, none of this testimony has any bearing on the point involved, namely the construction of Paragraph No. 5 of the will, unless as the trial court stated, the testimony of Mr. Lucas and the introduction of the other notes showed a course of dealing between the son



Allen B. Piper and his father Louis A. Piper.

The stipulations, while helpful in understanding the issues, throw very little light on the question involved. It was stipulated that the notes to the bank were unpaid; that judgment had been entered on them; that L. A. Piper was not a partner nor in any way interested as an owner in any capacity in the Paris Foundry & Machine Works; that L. A. Piper at no time received any of the money represented by the three unpaid notes, or the other notes introduced in evidence; that the money was transferred to the account of the Paris Foundry & Machine Works, which was owned entirely by Allen B. Piper.

The only question before the trial court was an interpretation of Paragraph No. 5 of the will, and the stipulations and the evidence do not disclose any facts or circumstances that might aid in the interpretation, unless the evidence that the father had for some years gone on the notes of his son, so that the son might borrow money from the bank, has some evidentiary value. The trial court admitted the notes made prior to the notes in question only as evidence of course of dealing between the father and son, but in it's opinion did not regard this course of dealing as decisive as to the father's

wishes as expressed in the will.

The plaintiff in his brief has broken down his "Points and Authorities" into "The Evidence", "The Promissory Notes", and "The Will" and has cited some sixty-five to seventy authorities in support of his contentions. The three divisions are then subdivided into subdivisions. The defendant in his brief has cited some twenty authorities, and has followed the method of the plaintiff by dividing into divisions and subdivisions. It is manifestly too much to expect this court to go through this maze of law touching on almost every phase of construction of a will, or to comment on each of the authorities cited. Some of the propositions set forth are not in question in this case, or at best could not be disputed. Where the authorities cited, or the proposition stated by the pleader is unquestioned, this court will not attempt to discuss the proposition. However, where there is a question as to the statement of the pleader, it will be discussed. For instance, under "The Evidence", subsection A, the plaintiff states this proposition: "A decree in chancery based on a misconception of the evidence and clearly against the evidence will be reversed on appeal." This point is not debatable, but an examination of the two cases cited in support of this statement of law fails to disclose any statement of the court in either case on this point. In fact, both



cases affirm the decree of the chancellor and in neither case is there any statement by the court that a decree in Chancery based on a misconception of the evidence and clearly against the evidence will be reversed on appeal. Certainly, the reviewing court, if it finds there was a misconception of the evidence, or if it can say that the decree is clearly against the manifest weight of the evidence, has a duty to reverse.

As to the evidence, the plaintiff cites a number of cases to the effect that parol evidence may be admitted to show the circumstances that surrounded the testator at the time the will was made. Parol evidence is not admissible where there is no ambiguity or uncertainty. Oral proof is not admissible to reform, alter, add to or detract from the terms of a will, but may be admitted for the purpose of understanding the circumstances by which the testator was surrounded. Turek v. Mahoney, 407 Ill. 476; Cahill v. Michael, 381 Ill. 395.

The next contention made by the plaintiff under "The Promissory Notes", subsection A, is that a co-maker on a note is primarily liable to the maker. This is not disputed. The holder of the note may sue one or both at his discretion. Both are primarily

liable, the person who gets the money and the accommodation maker. This liability has been set out in the Illinois Statutes, Chapter 98, Section 49, in this language: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party and in case a transfer after maturity was intended by the accommodating party notwithstanding such holder acquired title after maturity." There is no question of the liability of Louis A. Piper to the bank. The question is whether or not the testator, at the time he made the will, anticipated being called upon to pay a note or notes for money loaned to his son, Allen, upon which he would sign as an accommodation party in the future. Or, stated another way, did the testator, when he forgave any debt, obligation or claims he might have against either of his sons, consider an obligation running to some third party, on which he was an accommodation signer, as a debt or claim due him, or did he consider them a debt, obligation or claim of the bank against Allen? Did he intend to forgive something he did not even contemplate at the time of the making of the will? These are the



questions that the chancellor had to decide, and doing so there was little in the evidence or stipulations to help him. The answer lies in the interpretation of the words of the will itself and to determine from what is in the evidence or stipulations, if possible, what the testator intended to do. In construing the will the court has no power to rectify an inequity, or to alter or change the will. The court may not guess, infer, or presume an intention that may have been in the testator's mind, but must be guided by the whole will and the language therein. The intention of the testator must be determined from the language of the will itself and the entire will must be examined to determine the testator's intent. Chapin v. State Treasurer, 361 Ill. 645; Levings v. Wood, 339 Ill. 11; Cahill v. Michael, 381 Ill. 395.

There are many, many cases of will construction by the courts of Illinois. Each case presents a different set of facts or circumstances and while there are a number of broad rules that have been laid down by the courts, in applying those rules to any particular

case presents difficulties for the reason that, while some cases may be similar to one or more of those will cases decided by our courts, there always seems to be some small difference or unsettled question. This court in considering this case will adhere to the broad rules laid down, so far as possible.

In discussing those broad rules that have been promulgated by our Appellate and Supreme Courts, as previously stated, where a will is clear and unambiguous, extrinsic evidence is not admissible to aid or influence a construction of the will. If there is an ambiguity or uncertainty, oral testimony may be admitted, not for the purpose of altering or changing the will, but to better understand the circumstances by which the testatory was surrounded, the estate involved and the family. The whole will must be considered to determine the testator's intent. Bowers v. Webb, 339 Ill. App. 14; Boldenweck v. City National Bank & Trust Co. of Chicago, 343 Ill. App. 569; Davidson v. Davidson, 2 Ill. 2d 197; Sloan v. Beatty, 1 Ill. 2d 581; Allen v. National Bank of Austin, 19 Ill. App. 2d 149. The intention is to be determined from the writing within the four corners of the instrument. Waugh v. Poiron, 315 Ill. App. 78; McGlothlin v. McElvain, 407 Ill. 142. True intention of testator is to be given effect and is to be found by an examination of the language used in the will and by a consideration of the will in



all its parts, consistently keeping in mind the plan of the testator as expressed by the entire will. Bradley v. Bradley, 3 Ill. 2d 58.

In determining the intention of the testator, the words of a will are to be read in the light of circumstances under which will was made, including nature, extent and condition of testator's property as well as his relations to his family and the beneficiaries named. Knisely v. Simpson, 397 Ill. 605; In re Estate of Reeve, 393 Ill. 272. As said in the case of Franz v. Schneider, 14 Ill. App. 2d 464, cited by plaintiff, at page 471: "In construing a will it is the intent of the testator that must control. This intent is gathered from the language used considered in the light of the circumstances surrounding the testator at the time of the execution of the will. It is the intention at that time which governs and nothing which thereafter happens/^{can} in any way affect or change that intention." Another case cited by plaintiff, Caracci v. Lillard, 7 Ill. 2d 382, at page 386 said: "In construing doubtful provisions in a will the words employed by the testatrix must be viewed in the light of her circumstances and surroundings, including the state of her property and her family."

The intention of testator must be gathered from the words of

the will itself. Lavin v. Banks, 406 Ill. 605; Turek v. Mahoney, 407 Ill. 476; Faulkner v. Faulkner, 340 Ill. App. 30; Nicolai v. Reinbold, 343 Ill. App. 92. The question always is, what is the meaning of the words used in the will? Knight v. Knight, 367 Ill. 646; Cahill v. Michael, 381 Ill. 395. Testamentary intent is to be determined either by ascertaining the testator's actual meaning from the words employed, to which all rules of construction give way, or by finding his presumed intention by the application of rules of construction where the meaning is obscure, doubtful or uncertain. Wiener v. Severson, 11 Ill. 2d 347.

Although will speaks from death of testator for purpose of ascertaining its effect and operation, for purpose of ascertaining testator's intention will must necessarily speak from date of its execution. Tuttle v. Murphy, 351 Ill. App. 250. Construction of will cannot be made to depend upon subsequent facts or conditions arising after will takes effect, nor can court surmise what provision would have been made by testator for beneficiaries had he anticipated change in circumstances surrounding him at time of execution of will. Murphy v. Graham, 349 Ill. App. 44.

Keeping in mind the law governing the construction of wills as stated in the cases heretofore cited, it must be pointed out that the evidence as to the circumstances surrounding the testator

is such that sheds very little light on the matter here. The fact that the testator had for years signed notes with his son to the bank, so that the son might operate his business, the testator receiving none of the money at any time, does, as the trial court evaluated it, show a course of dealing, but it does not explain the wording of the paragraph in question. The testimony that the son Allen B. Piper visited his father frequently and did chores for the father, took him on trips and generally was with him more than the other son, has little weight, in the light of the terms of the will which, subject to the rights of the wife, and the trust, left everything to the two sons, equally, share and share alike.

Apparently the will was drawn by the testator. While it is definite enough, the language is not the language of a lawyer trained in the drawing of wills. The will was executed April 20, 1950, and the testator died on July 16, 1955, leaving surviving him his widow and the two sons, Allen B. Piper, plaintiff in this suit, and Harry K. Piper, defendant in this suit. Generally, he left his estate in trust for the support of the widow, and upon her death, in trust for the two sons. The Edgar County National Bank of Paris was to act as trustee to manage the property, collect

the income and use the same for the support of the widow and after her death to pay the income in equal portions to the two sons. An examination of the will shows that the testator intended to treat each son equally, there was no preference as to either, and if the provisions of Paragraph No. 5 had been clear, there would be no problem.

The dispute arises over the construction of Paragraph No. 5 of the will, which is in the following language:

"I will any and all debts, obligations or claims that I may have against either of my sons be cancelled and held for naught, and in the event that either of my sons shall owe me or my estate any sums of money, he shall not be required to pay the same."

The three notes in question, totaling \$14,700.00, plus interest, had been reduced to judgment by the holder, the Edgar County National Bank of Paris. All three notes were signed in the same manner as the notes of other years had been signed, with the firm name of Paris Foundry & Machine Works, and under the firm name the names of A. B. Piper and L. A. Piper. Two of the notes were renewal notes, but all three obligations originated approximately three years after the execution of the will. Up to the time of the death of the testator, L. A. Piper, the

three notes in question were not due, and it was some time after the death of L. A. Piper, and after the estate was in the process of administration, that the bank filed its claims in the county court and judgment was entered for the notes and interest accrued thereon. There is no question that the judgments on the notes constitute valid obligations against the estate of L. A. Piper. As an accommodation maker only on these notes, and it seems unquestioned that L. A. Piper was only an accommodation maker and did not receive any of the money, and if the estate pays these judgments, it seems unquestioned that the estate would have a claim for recompense from Allen B. Piper, unless the provisions of Paragraph No. 5 of the will relieved him of payment. If, by this provision he is relieved, the estate would be lessened by approximately \$15,000.00, and the other brother's share would be lessened \$7,500.00. While this apparent inequity between the sons would not, of itself, constitute or form a basis for this court to determine the intention of the testator, it must be considered in the light of the whole will.

As said before, apparently the father, L. A. Piper had no preference between his sons and by the terms of his will intended

to treat them equally and without favoritism. The paragraph speaks of cancelling and holding for naught, debts, obligations and claims he may have against "either of my sons" indicating his desire to treat them equally. A reading of the whole will leaves no doubt of this intention. With this in mind, it is necessary to discuss the question of whether the testator, at the time he made the will, in forgiving any debts, obligations or claims he may have against either of his sons, anticipated his estate being called upon to pay approximately \$15,000.00 for a debt of Allen B. Piper, and forgave that or any other debts of Allen in the future. The course of dealing referred to by the trial court showed that apparently Allen B. Piper over a number of years had paid his notes to the bank. While legally, the testator was a primary obligor on the notes, actually this primary obligation has a contingent feature, since the debt was Allen's and the money went to Allen. While the bank could proceed against either or both, by lending his name on a note to the bank for his son Allen, did the testator, at the time he made his will, consider this a debt, obligation or claim he had against Allen? Or did he, based upon the course of dealing which had gone on for over ten years, in which Allen paid these obligations,

consider these notes, as debts, obligations or claims of the bank against Allen? The trial court in its Memorandum Opinion breaks the paragraph of the will in two parts, and observes that the first part, "I will any and all debts, obligations or claims that I may have against either of my sons shall be cancelled and held for naught," seemed to be a studied attempt on the part of the testator to express in clear and unmistakable language what his purpose and thought was. But the opinion continued, the testator was not content to let this phrase stand alone and added a qualifying phrase, or rather a explanatory phrase in the following language: "and in the event that either of my sons shall owe me or my estate any sum of money, he shall not be required to pay the same." The trial court's interpretation of this second part which he calls an explanatory phrase, is that the testator was thinking in terms of money, of obligations which the layman would regard as actual debts. Not debts from the son to the bank, but debts from the son to the testator. This court agrees with that interpretation. Louis A. Piper was a layman. While he undoubtedly knew when he signed the notes in question, that if Allen B. Piper did not pay them, he could be made to pay them by the bank, as a layman he must have considered

them as obligations and debts of Allen to the bank and not obligations and debts of Allen to himself. The fact that he had signed notes of similar character over a period of ten years for Allen and Allen had always paid them, would further indicate that Louis A. Piper considered these notes debts and obligations of Allen B. Piper and not of himself. While primary obligations of Louis A. Piper legally, yet as a layman, he must have considered his obligation as secondary or contingent upon non-payment by his son. The fact that Allen B. Piper had paid his obligations to the bank for ten years or more would further indicate that the father had no doubt that he would pay the three notes in question. At no time, either in 1942 or at the time of death of his father in 1955, did Allen B. Piper owe his father any money, nor did his father have any debt, obligation or claim against him. Instead, Allen B. Piper owed the bank during these years and any debt, obligation or claim of the father or his estate would arise only upon the contingency that Allen B. Piper did not pay the notes to the bank when due. While the language "debts, obligations or claims" is broad language and would cover almost every kind of indebtedness, we agree with the trial court that the testator intended, by the use of the language in the latter part of the

paragraph, as an explanation of what he did mean in the first part of the paragraph, and when he used the words "in the event that either of my sons shall owe me or my estate any sums of money, he shall not be required to pay the same," he meant money owed by his sons to him at the time of his death. If we adopt this construction, and it seems logical, then the father intended to forgive only money and indebtedness he had advanced to either of his sons and not to indebtednesses of either of the sons to other parties. The case of Tuttle v. Murphy, 351 Ill. App. 250, holds that for the purpose of ascertaining the testator's intention the will must necessarily speak from the date of its execution, in this language: "The next question arises, is what interpretation we must give the language of the testatrix in this will and whether it should be at the time the will was executed, or whether it speaks from the death of the testatrix. It has frequently been held that to interpret a will, you must consider the facts and circumstances of the testator at the time the will was executed. In Heckler v. Young, 264 Ill. App. 34, the Appellate Court of the First District had this same question presented to it and we there find this language: 'It is axiomatic that in determining such a question as this the court should attempt to put itself in the place

of the testator for the purpose of arriving, if possible, at the intention of the testator. It has been aptly expressed that to arrive at the intention the court "sits in the testator's armchair." Boyle v. Moore, 299 Ill. 571; Wallace v. Noland, 246 Ill. 535; Bingel v. Volz, 142 Ill. 214; Himmel v. Himmel, 294 Ill. 557. While it is the general rule that a will speaks from the death of the testator, yet this rule has limitations where there are circumstances which indicate that to enforce the rule will not carry out the intention of the person making out the will. In In re Mandelle's Estate, 252 Mich. 375, the court said: "It is more accurate to say that a will is not operative until the death of the maker, and then speaks the intention of the maker at the time of its execution."" For the purpose of ascertaining the intention of the testator, a will must necessarily speak from the date of its execution. Lydick v. Tate, 380 Ill. 616; Tuttle v. Murphy, 351 Ill. App. 250.

We do not find any cases in Illinois on the precise question presented here. The defendant filed a "Memorandum of Additional Authorities" and in these additional authorities cited Jarman on Wills, (8 ed) Vol. 2, page 1098, which lays down the following rule: "A surety's equitable right to be indemnified by the principal debtor does not create any debt before the surety has

been called on to pay anything under his guarantee, so that a release of 'all debts' to a principal debtor by the surety's will does not affect the right of the executors to come on the principal debtor's beneficial interest under the will for indemnity against claims under the guarantee made by the creditors after the testator's death." The first part of this citation is applicable to this case.

The defendant also cites a case entitled In re Mitchell. Freelove v. Mitchell, 1 Ch. 201 (1913). That case is similar in many respects to this case. In that case there is a forgiveness of debts to a nephew. As in this case, there was an indebtedness to the bank which the estate of the testator was called upon to pay and the court in interpreting the word "debts" in the will says this: "If I look at the particular words used here, it appears to me that what the testator is really considering is debts in the proper sense of the word, that is to say, moneys actually due and owing, capable too of carrying interest if such is the bargain between the parties, and not contingencies which may ripen at some future date, by reason of a number of events that may happen, into a debt at law or in

equity in the ordinary sense of the word. It does not appear to me that the words are meant to include contingencies of this sort. It might be, for instance, that at the date of his death the testator had been called upon to pay, and had actually paid, money under the guarantee. In that case there would be no doubt that that would be a debt due from the principal debtor to the surety. On the other hand, he might not have been called upon to pay and might not have paid anything, and it does not follow at the date of his death that he must necessarily be called upon to pay or must necessarily pay anything; it might happen that the principal debtor might pay off the bankers' liability, and in that case there would never be any debt at all."

The plaintiff also cites the Mitchell case as "Additional Memorandum of Authority". However, it would appear from reading the excerpts of the Mitchell case cited by the plaintiff, that they support the position of the defendant. While the authority of the Mitchell case is only persuasive to this court, it does show the thinking in other jurisdictions and it coincides with the reasoning of this court in this case.

In interpreting the intention of the testator, Louis A. Piper, at the time he made his will this court is of the opinion that he did not intend to forgive anything to his sons except debts

owed by the sons to him. We agree with the reasoning of the Chancellor and the Judge of the English Court and interpret the words "debts, obligations and claims" as used in the will of the testator, to mean debts actually due and owing. We do not believe, in the light of the language used, that Louis A. Piper contemplated, at the time of the making of the will, that his estate would be called upon to pay approximately \$15,000.00 for the debt of one of his sons. Neither do we believe that he contemplated giving out of his estate that sum to pay the debts of one son, to the detriment of the other. Rather, we believe he intended to divide his estate equally between his sons, share and share alike, with no preference to either. We do not interpret his words to mean that he looked to the future to anticipate and forgive a debt that was incurred some three years after the making of the will.

It is therefore the opinion of this court that the forgiving of debts, obligations and claims of Louis A. Piper against either of his sons, did not include the debt of Allen B. Piper to the Edgar County National Bank of Paris, and in the event that the estate shall be required to pay the judgments of the bank, the estate is entitled to recompense from Allen B. Piper or his estate.

For the reasons stated, the judgment is affirmed.

Affirmed.

CARROLL, P.J. and ROETH, J., concur.

STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at

Springfield, on the FIRST TUESDAY in MAY A. D. 19 60

PRESENT

HONORABLE C. ROSS REYNOLDS, Presiding Justice

HONORABLE WILLIAM M. CARROLL, Justice

HONORABLE BURTON A. ROETH, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 7th day of

SEPTEMBER, A. D. 19 60, there was filed in the office of the said Clerk of said Court,

an opinion of said Court, in words and figures following:

84219

FILED

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10302

Agenda No. 12

C. David Pearson,

Plaintiff-Appellee,

vs.

Board of Education, Community Unit School
District No. Five, Macoupin County, Illinois,

Defendant-Appellant.

Appeal from the
Circuit Court of
Macoupin County

REYNOLDS, J.

This suit arises out of the claim of C. David Pearson, the plaintiff, for wages claimed due him from the defendant school district, during the period of his suspension, and until his discharge. The case was tried without a jury and the trial court entered judgment for the plaintiff in the amount of \$900.00, plus interest from date of discharge. From that judgment the defendant school district appeals.

The plaintiff and the Board of Education of Community Unit School District No. 5, Macoupin County, Illinois, entered into a written contract for the plaintiff to teach in the schools of the district in May 1954, the term of employment to begin September 1, 1954 and to be for nine months, the salary to be \$4050.00 for

the school year, to be paid in monthly payments at the end of each school month. On September 3, 1954, the Board of Education of the school district suspended the plaintiff and he was notified of this suspension on September 4, 1954. In the notice of suspension the Board notified the plaintiff he had been suspended under the Teacher Tenure Act, and that on November 4, 1954 he would be discharged. The plaintiff then asked for a hearing by the Board of Education. A hearing was had and the Board affirmed its previous action. The plaintiff sued for administrative review of the Board's action, in the Circuit Court of Macoupin County. It being affirmed there, he appealed to the Appellate Court of Illinois, Third District, and the action of the Board was again affirmed. The right of the Board to discharge having been decided, the only point before this court is the question of whether plaintiff is entitled to salary to the date of his discharge.

It does not appear to be disputed that the plaintiff was under the Teacher Tenure Act, and that any rights or remedies he may have must be pursued under that Act. Since that Act is the guiding star for the determination of this appeal, it is necessary to look to the language of the Act itself. The Act which is designated Teacher Tenure Law, Article 24, Chapter 122, Illinois Revised Statutes, consists of eight sections, but for the purpose of this appeal, only

Section 24-3 needs to be considered. This section provides for the removal of a teacher by a school board or board of education, providing in detail the steps necessary to suspend or discharge a teacher, the notices necessary to be given, the right of the teacher to a hearing, the method of hearing, and by reference, the grounds for suspension or removal.

The defendant board contends that the plaintiff is entitled to salary only for four days, beginning September 1st and to include September 4th, 1954, the date he received notice of the board's action of September 3rd, 1954, when he was suspended. The plaintiff contends that he was not discharged by the notice of suspension and was not at liberty to seek other employment. That the Board could withdraw the suspension order and reinstate, and that therefore he was entitled to pay until finally discharged.

It is contended by the plaintiff that Section 24-3 of Article 24, Chapter 122, Illinois Revised Statutes, provides that the teacher is entitled to a 60 day notice; that he cannot be suspended and dismissed at the same time. The section does provide for the giving of a 60 day notice in the following language:

"Notwithstanding the entry upon contractual continued service, any teacher may be removed or dismissed for the reasons or causes provided in Sections 6-36 and 7-16, in the manner hereinafter provided. If the removal or dismissal results from the decision of



the board to decrease the number of teachers employed by the board or to discontinue some particular type of teaching service, written notice shall be given the teacher by registered mail at least sixty days before the end of the school term, together with a statement of honorable dismissal and the reason therefor, but if the position so discontinued is reinstated within a period of one calendar year it must be tendered to the teacher dismissed because of such discontinuance. If the dismissal or removal is for any other reason or cause it shall not become effective until approved by a majority vote of all members of the board upon specific charges and after a hearing, if a hearing is requested in writing by the teacher within ten days after the service of notice as herein provided. Written notice of such charges shall be served upon the teacher at least sixty days before the effective date of the dismissal or removal, which date shall be between November first and the date of the close of the school term."

After providing the rules for the giving of notice of hearing and for the conduct of the hearing itself, the section uses this language: "If in the opinion of the board the interests of the school require it, the board may suspend the teacher pending the hearing, but if acquitted the teacher shall not suffer the loss of any salary by reason of the suspension."



Here the plaintiff was suspended and notified that he would be discharged on November 4, 1954. He asked for and received a hearing. The suspension and discharge was affirmed by the board, and this was later affirmed on administrative review by both the Circuit Court of Macoupin County and the Appellate Court of Illinois, Third District.

At first reading of the section, it would appear that the two quoted portions of the section are repugnant, and that a suspension, without the 60 days notice would not operate to terminate the teacher's employment. A more careful reading would show however, the intention of the legislature was that the suspension operated to terminate employment, and he would only be entitled to salary if he was acquitted of the charges upon which the suspension was based. It must be noted that the 60 days notice was complied with as to the date of dismissal, or discharge. The statute uses the terms "dismissal" and "removal" as meaning the same. It does not so designate the term "suspension". But the term "suspension" means that the activities of the teacher are suspended pending a hearing or pending dismissal or removal. To further emphasize this language construction is the fact that the statute provides that if the teacher is acquitted of the charges against him, he is entitled to salary up to the time of



the decision of the board at the hearing. Conversely, it must be interpreted that if he is found guilty of the charges, he is not entitled to salary during this period between the date of suspension and the date of removal or dismissal. Here he was found guilty of the charges, so he is not entitled to any salary from the date the notice of suspension was served upon him, to the date of dismissal or removal. He is entitled to salary for the four days prior to the service of notice of suspension, namely September 1st, 2nd, 3rd and 4th.

Plaintiff contends that an employee is entitled to pay until legally discharged, and relies upon the case of People ex rel. Lasser v. Ramsey, 23 Ill. App. 2d 100, which was a suit against the Commissioner of Buildings of the City of Chicago, the members of the Civil Service Commission of the City of Chicago, and others, for salary as a Survey Inspector in the Department of Buildings, for periods during which he claimed he was illegally suspended from his position. Lasser was first suspended for 30 days on March 13, 1954, for carrying a concealed weapon. Thereafter, Ramsey, the Commissioner of Buildings, would reinstate him for one day, then suspend him again for 30 days, until August 6, 1955 when he was suspended indefinitely. Lasser was finally tried on the charge of carrying concealed weapons in July 1955, and afterwards charges



were filed against him and a hearing was held in April 1956. He was found guilty and removed from his position. During the one day periods when Lasser was reinstated, he was paid for services for that day and he cashed the checks. Defendants contended that Paragraph 51 of the Civil Service Act, Chapter 24½, Paragraph 51, Illinois Revised Statutes, authorized the head of a department to make repeated suspensions of an employee provided such suspension periods did not exceed 30 days. Paragraph 51 of the Act provided for 30 day suspensions in this language: "Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days." The court disagreed with this contention holding that such interpretation would give a department head a virtual power of removal, which is vested in the civil service commission and surrounded by the safeguards of a full hearing. In that case, the suspension was illegal, since the suspension could only be for a period of thirty days, not continuing periods of thirty days, with one day periods of employment in between. The case is not applicable for the further reason that the Teacher Tenure Law is an entirely different act with a procedure that is only applicable to the suspension or removal of teachers.

There can be no basis for argument with the statement and



authorities cited under Plaintiff's Point "C" of his "Points and Authorities". Certainly the Teacher Tenure Law was enacted to protect teachers, McNely v. Board of Education, 9 Ill 2d 143. At the same time it was enacted to protect school Boards. While Section 24-3 of the Act provides rules and regulations to protect the rights of the teacher, Section 24-6 of the Act provides for the protection of the school board. The act was an attempt to improve the whole school system of Illinois.

We see no merit in the claim of the plaintiff for salary until November 4th, 1954. He was under suspension and therefore relieved of his duties. It is true the board could rescind its action, and in that case, upon such rescission, the teacher would be entitled to salary for the full time from the date of suspension to the date of rescission. But as the Statute provides in this case, the teacher may be suspended. He is entitled to a hearing, which in this case was had, and he was discharged. He is only entitled to pay during the term of suspension in case of acquittal; he was not acquitted but discharged.

The plaintiff is entitled to pay for four days of service, at the rate of \$15.00 per day, or \$60.00 for the four days. The cause is reversed and remanded with instructions to the trial court to enter judgment for the plaintiff in the amount of \$60.00 and the costs to be assessed against the plaintiff.

Reversed and remanded with instructions.

CARROLL, P.J. and POETH, J., concur.

STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at
Springfield, on the FIRST TUESDAY in MAY A. D. 19⁶⁰

PRESENT

27 I.A. 1.3^{2d}

HONORABLE C. ROSS REYNOLDS, Presiding Justice

HONORABLE WILLIAM M. CARROLL, Justice

HONORABLE BURTON A. ROETH, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 12th day of
SEPTEMBER, A. D. 19⁶⁰, there was filed in the office of the said Clerk of said Court,
an opinion of said Court, in words and figures following:



FILED

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10298

Agenda No. 9

Albert Crawford,

Plaintiff-Appellee,

vs.

Arthur Brockhouse,

Defendant-Appellant.

Appeal from the
Circuit Court of
McLean County.

REYNOLDS, J.

Albert Crawford, a farm employee filed suit against Arthur Brockhouse, his farmer-employer, charging negligence on the part of Brockhouse when Crawford fell in the corn crib of the defendant. The negligence was denied by the defendant, and the defendant claimed as an affirmative defense there was an assumed risk on the part of the plaintiff, which plaintiff denied. The case was tried before a jury and the jury returned a verdict for the plaintiff for \$2000.00. Judgment was entered upon the verdict and the defendant's post-trial motion being denied, he appeals.

The theory of the appeal is that there was no evidence to



support the verdict that the defendant was guilty of negligence; the doctrine of assumed risk applies; the plaintiff made a judicial admission of facts that cleared the defendant of liability; that the court erred in giving one instruction and erred in refusing one instruction for the defendant; and that the verdict was manifestly and palpably against the weight of the evidence. No question is raised in the appeal as to the extent of the injuries or the amount of damages.

The only evidence bearing on the question of negligence or assumed risk is that of the plaintiff and the defendant. The injury occurred when the plaintiff and the defendant were attempting to nail a 1 x 6 inch board on the 2 x 4 studs that made up a partition in the corn crib. Nailed to the vertical studding were 1 x 6 inch boards, nailed horizontally, far enough apart to make a barrier for corn. These horizontal boards were nailed up to about eight feet. Brockhouse was filling the crib on one side, by means of an elevator that was dropping the corn through a hole in the roof. The corn had filled to the top of the partition and Brockhouse decided to nail another board on the partition, so as to increase the height of the partition and prevent the corn from spilling over into the other part of the crib. The corn sloped away from the partition and the plaintiff and the defendant walked



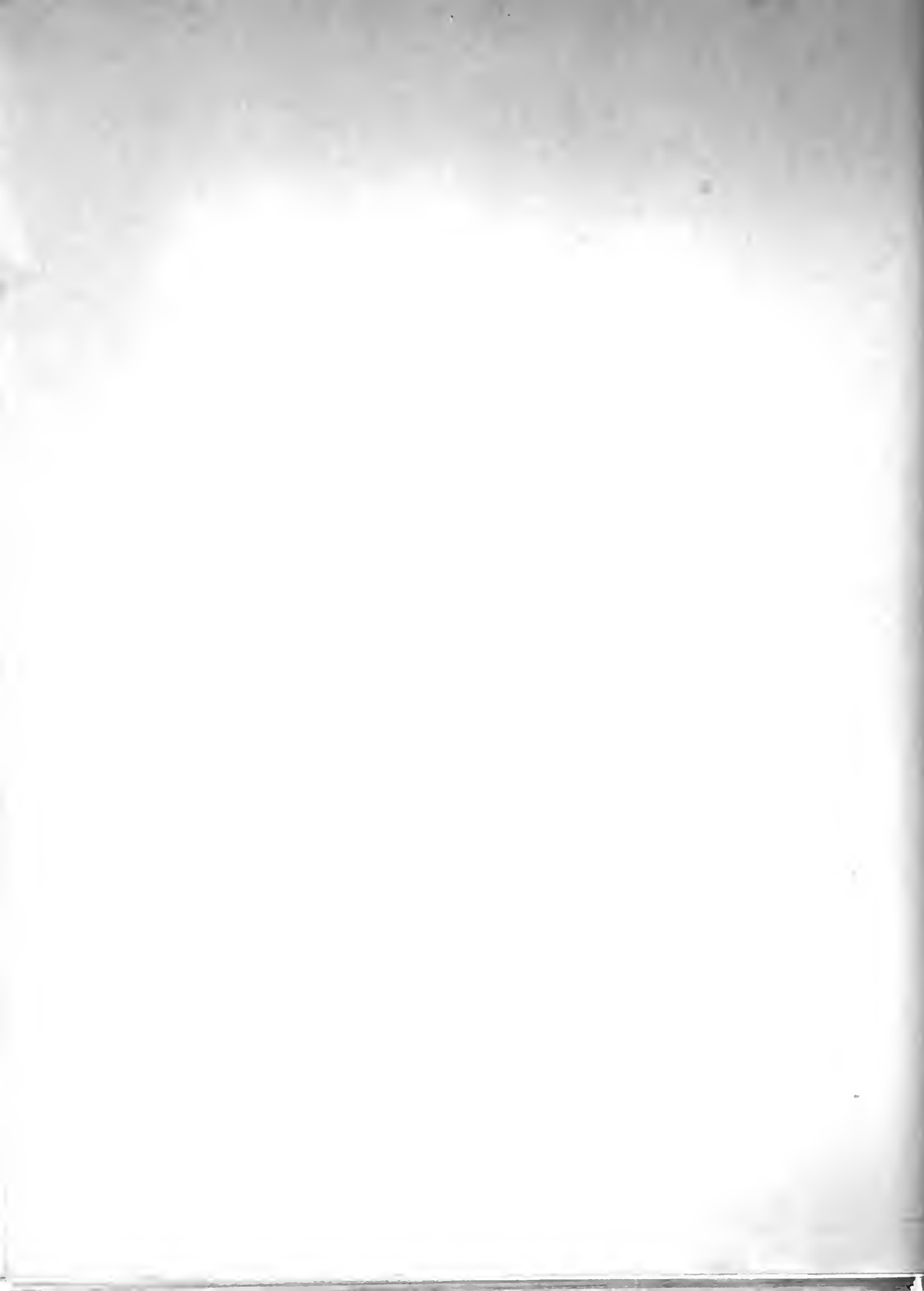
up the slope of the corn to the partition with a short piece of board, about five feet long, to nail it on. The 1 x 6 inch boards were away from the corn, that is, on the other side of the 2 x 4's so that the corn was pushing against the horizontal 1 x 6 inch boards. Crawford nailed one end of the board, with Brockhouse holding the other end. Then Crawford went to the end where Brockhouse was holding. Brockhouse says that Crawford put his knees between the 2 x 4's, shoved against the board and fell through the 2 x 4 studs. He fell approximately eight feet to the floor, breaking his arm at the elbow. There is no question that Crawford was acting under the direct instructions and supervision of the defendant Brockhouse in nailing the board. Crawford testified that the corn slid and he fell. Brockhouse testified that Crawford put his knees against the board and fell. Other than this difference in the testimony, there is little in the testimony of either the plaintiff or the defendant that is contradictory.

While the work in which the plaintiff and defendant were engaged at the time of the injury might be classified as carpenter work, it might also be classified as ordinary repair work incident to a farm. The plaintiff had had some experience as a carpenter, but his employment was to do general farm work and his testimony



shows that he was engaged in barning corn, painting around the farm, carpenter work incident to the farm, cutting grain, cutting weeds and running the grain elevator.

The defendant's position in this case must stand or fall on the question of the assumption of risk by the employee. Both Brockhouse and the plaintiff were in a dangerous position, atop corn which threatened to top the partition and slide into the other side of the corn crib. They were both eight feet or more above the floor on the other side of the partition, which was a wooden floor, and were standing on corn which could and, according to the plaintiff's testimony, did, slide beneath them. The plaintiff was acting under direct orders of the defendant, and had gone into the place of danger under the direct order of the defendant. It is true that the defendant at the moment when the injury occurred did nothing to cause the injury, but it is equally true that he had placed both himself and the employee in the place of danger. So that in order to relieve himself of the charge of negligence, it is necessary to show, that under the law that the employee assumed the risk and was therefore chargeable with his own injury. In discussing the doctrine of assumed risk, disposition of this question will dispose of the contention of the defendant that the trial court



should not have given Plaintiff's Instruction No. 3.

The doctrine of assumption of risk is the doctrine whereby an employee assumes the risk, hazards or dangers ordinarily incident to discharge of his duties in the particular employment. It is peculiar to the relationship of master and servant. But, the master's negligence is not recognized as being an ordinary and usual risk incident to the employment. The master must use reasonable care and caution to secure the safety of his servant while engaged in and about his business. After the master has exercised the reasonable care required of him by the law, the servant assumes the risk peculiar to his particular work. In the exercise of reasonable care on the part of the master, he is required among other things, to provide a reasonably safe place to work. Stone v. Guthrie, 14 Ill. App. 2d 137. This rule is qualified in that if the servant has knowledge that the place provided for work is unsafe and he continues to work without complaint, he also appreciates the danger incident, and is chargeable with that knowledge. Richter v. Tegtmeier, 167 Ill. App. 478; Wheeler v. C. & W.I.R.R. Co., 267 Ill. 306; Stone v. Guthrie, 14 Ill. App. 2d 137.

In this case, the plaintiff had some knowledge of carpentry.



He was a man of ordinary intelligence and education. He may have known of a safer way to do the work. In the case of Stone v. Guthrie, 14 Ill. App. 2d 137, it was held that knowledge of the unsafe condition is not enough. The servant must select the unsafe condition voluntarily, and he must know or be chargeable with knowledge of the danger inherent and that the danger was so imminent and threatening that a man of ordinary prudence would not have taken the chance of encountering it. In this case, it would have been a simple matter to go into the unused portion of the crib, place a ladder or some other method to give him height and nail the board to the 2 x 4 studding. In this case, however, he used the other method, because of his master's orders, so that it could hardly be said that he entered into an unsafe place voluntarily.

In the case of Jones & Adams Co. v. George, 227 Ill. 64, cited by defendant, the driver in a coal mine was injured by a sagging roof. The plaintiff had been driving in the mine for three years and by the place where he was injured for two months, and he passed this point fifteen or twenty times a day, and he must have known of the condition of the roof. Yet, the court in that case said that the question of assumed risk was not a matter of law, but was a question of fact for the jury.



If the master here, Brockhouse, by his orders placed the plaintiff in a position of danger, then the question of negligence on his part becomes a question for the jury. If the jury finds that there was negligence on the part of the employer, the law does not recognize the master's negligence as being an ordinary and usual risk incident to the employment. Stone v. Guthrie, 14 Ill. App. 2d 137; Lester v. Hennessey, 20 Ill. App. 2d 479.

If the danger is so apparent that an ordinary person would recognize the danger and continued to subject himself to the danger, the assumed risk is a matter of law and need not be submitted to a jury. On the other hand, if there is any question of fact, or a conflict as to the material facts, then the assumption of risk becomes a question for a jury. And where a jury returns a verdict upon conflicting evidence it should not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. Spiker v. Christenson, d/b/a Ham & Merv Taxi Co., 12 Ill App. 2d 557; Stone v. Guthrie, 14 Ill. App. 2d 137.

The defendant cites three cases in support of the contention that a plaintiff's recovery is not sustainable under the doctrine of assumption of the risk unless it is shown from the evidence that the employer is in a better position to anticipate the harmful occurrence than the employee. A careful reading of those cases does not



bear out this contention. The case of Christiansen v. Graver Tank Works, 223 Ill. 142, does announce the rule that if the danger is so obvious as to be apparent to a person of ordinary intelligence, the law will charge the servant with knowledge of the danger. The case of Jones & Adams Co. v. George, 227 Ill. 64, states the rule that whether an employee assumes the risk of injury or was guilty of contributory negligence are questions of fact for the jury, even though the evidence is practically uncontroverted, unless the inference that he did assume the risk or was guilty of contributory negligence is so clearly deducible from the facts that all reasonable minds would reach that conclusion. That case is also authority for the statement that to preclude a recovery for damages by a servant for an injury it is not essential that he have actual knowledge of the dangerous condition, provided the condition is such as should have been known to him had he exercised reasonable care for his own safety. The general rule is that a servant only assumes the ordinary risks incident to his employment, and such dangers as are obvious and apparent. Moore v. Wabash Ry. Co. 219 Ill. App. 574; Postal Telegraph Cable Co. v. Likes, 225 Ill. 249. Risk, hazards and dangers which are ordinary, usual and incident to the employment of the servant are assumed by him and the master is not liable for injuries resulting therefrom. R. S. Wall v. Elgin, Joliet & Eastern Ry. Co.

196 Ill. App. 429. Generally, a workman of mature years must be held to assume such risks or dangers as are necessarily incident to his employment, but only such as are usual, ordinary and remain so incident after master has taken reasonable care to prevent or remove them, or if extraordinary, such as are so obvious and expose him to danger so imminent, that an ordinarily prudent man would anticipate an injury. Faulkner v. New York Cent. R.Co. 232 Ill. App. 346; Malott v. Hood, 201 Ill.202.

An assumed risk has been defined as one which cannot be obviated by the adoption of reasonable measures of precaution by the master. Hinchliff v. Robinson, 118 Ill. App. 450.

While a servant assumes all ordinary risks incident to his employment, he does not assume extraordinary ones, or those whereof he has no knowledge, and by reason of lack of such knowledge no opportunity to guard against. Sturm v. Consolidated Coal Co., 248 Ill. 20.

A servant has been held not to have assumed a risk, unless the danger was obvious, and he understood the danger. Roloff v. Luer Bros. Packing & Ice Co., 263 Ill. 152.

The defendant contends that where all the evidence is taken most favorable to the plaintiff and there is still no evidence to



support the allegations of the complaint, or if only a bare scintilla of evidence has been adduced by the plaintiff, a verdict should be directed in favor of the defendant. This is the law laid down in Shevlin v. Jackson, 5 Ill. 2d 43. It is slightly different in other cases cited on this point, namely Tucker v. New York, Chicago & St. Louis R. Co., 12 Ill. App. 2d 545 and Hocker v. O'Klock, 16 Ill. App. 2d 414, where the rule is announced that such motions for directed verdict for the defendant should only be allowed if, when all the evidence is considered in its aspects most favorable to the plaintiff together with all reasonable inferences to be drawn therefrom, there is a total failure of proof on one or more essential elements of the case. Whether there is a total failure or a bare scintilla of evidence for the plaintiff is not important here. Here there is evidence that the place was dangerous and this was proven by the fact that the plaintiff fell and was injured. The plaintiff claims the corn slipped under him. The defendant claims he pushed against the board and fell. In either event, what happened was because the plaintiff was in this dangerous place at the orders of his employer. Whether he is correct and the corn slipped under him, or his employer is correct and he pushed against the board and fell,

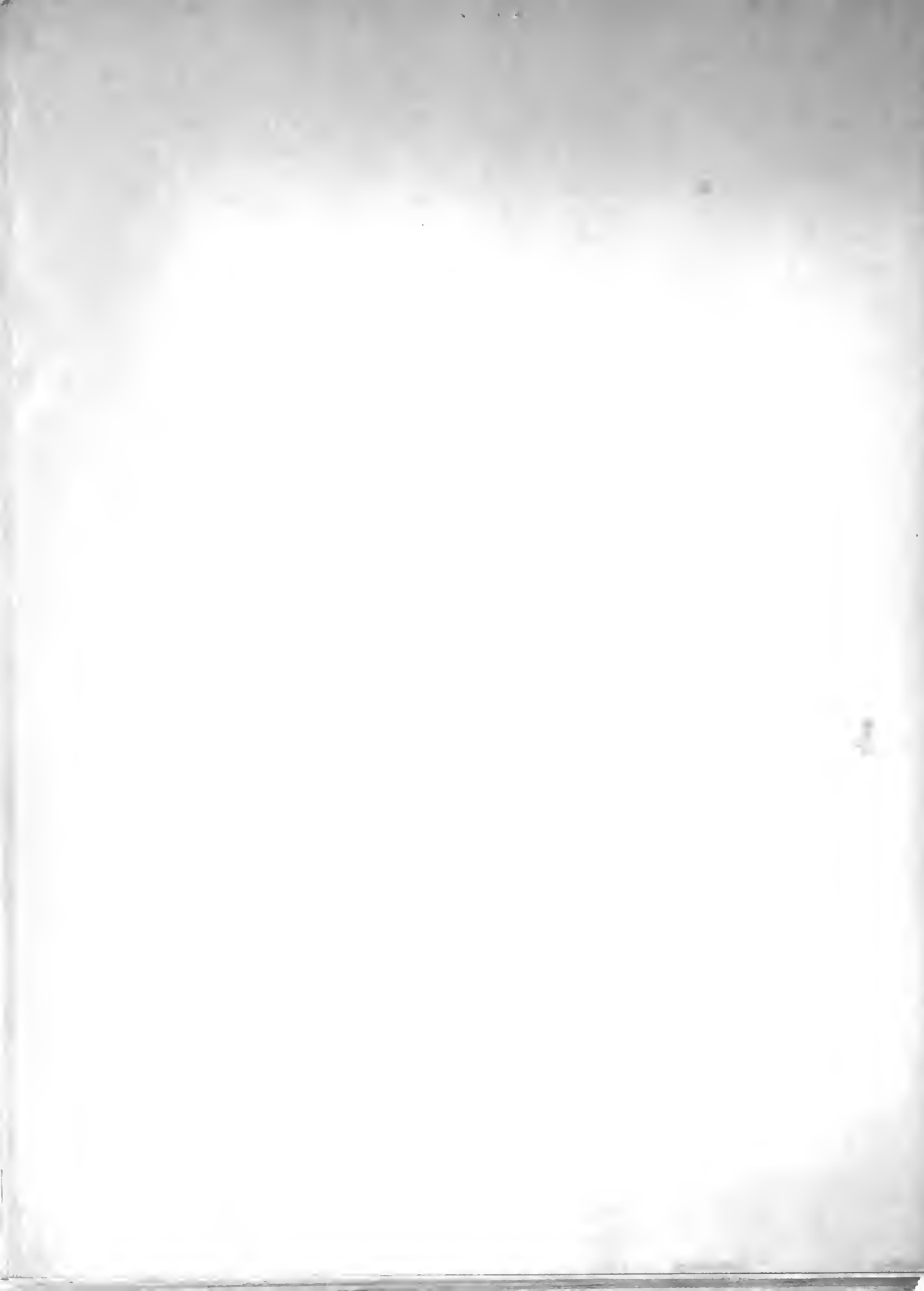


a question of fact is presented to the jury. It is true, with this one exception, there is little if any, controverted facts. But the one exception raises several questions for a jury to consider. 1. Did the plaintiff know of the danger and did he assume it? 2. Was there negligence on the part of the employer? 3. Was the danger so apparent that a person of ordinary intelligence would recognize the danger? 4. Was this an ordinary risk incident to his employment? 5. Was the place where he was working in such a condition that had he used ordinary care for his own safety he would have or could have prevented his injury? These are questions for the jury. As said in the case of Jones & Adams Co. v. George, 227 Ill. 64, at page 68: "In considering the question whether appellee assumed the risk because of his knowledge of the danger, or whether he was guilty of contributory negligence in failing to observe the danger, this court is not permitted to weigh the evidence and determine the question upon what we might consider the preponderance of the proof, but we are only to determine whether there is any evidence fairly tending to negative the appellant's contention with respect to these questions. While the evidence here is practically uncontroverted, yet we are not prepared to say that the inference of an assumption of the risk, or of contributory negligence, is so clearly deducible from the facts that all reasonable minds would necessarily reach the same conclusion therefrom. Unless we could say this, the



questions of contributory negligence and assumption of the risks by the Appellee cannot be treated as questions of law. *Browne v. Siegel, Cooper & Co.* 191 Ill. 226; *Beidler v. Branshaw*, 200 Ill. 425; *Hewes v. Chicago and Eastern Illinois Railroad Co.* 217 Ill. 500."

In the case of Stone v. Guthrie, 14 Ill. App. 2d 137, there was a conflict in some of the material facts. Here, as in that case, there was evidence in the record from which the jury could justifiably conclude that the defendant was negligent, and that the plaintiff did not assume the risk of his injury. And the court in the Stone v. Guthrie case said: "Where evidence is conflicting, it is for the jury to weigh the evidence and determine the credibility of the witnesses, and a verdict based upon conflicting evidence approved by the trial judge should not be disturbed on appeal unless contrary to the manifest weight of the evidence. *Spiker v. Christeson, d/b/a Ham & Merv Taxi Co.*, 12 Ill. App. 2d 557, 140 N. E. 2d 302. To be contrary to the manifest weight of the evidence an opposite conclusion must be clearly evident. *DeLong v. Whitehead*, 11 Ill. App. 2d 330, 137 N. E. 2d 276; *Green v. Keenan*, 10 Ill. App. 2d 53, 134 N. E. 2d 115; *Griggas v. Clauson*, 6 Ill. App. 2d 412, 128 N. E.^{2d} 363. Such is not the situation in the case at bar." We regard the law in the Stone v. Guthrie case



and the case of Jones & Adams Co. v. George, 227 Ill. 64,
as governing in this case.

For the reasons stated we must hold that Plaintiff's Instruction No. 3 was proper. This instruction correctly stated the law applicable to the matters in evidence and at issue. As to Defendant's Instruction No. 7 which the trial court refused to give, a reading of the instruction shows that it is an assumption that the plaintiff assumed the risk and is to that extent peremptory. While the instruction is correct as to the law, the refusal to give it is not reversible error, since a reading of the other instructions given for the defendant show that the jury was amply and fully instructed as to the theory of the defendant that the plaintiff assumed the risk.

Finally, the defendant contends that the plaintiff made a judicial admission of facts which constitute contributory negligence on the part of the plaintiff, or freedom from negligence on the part of the defendant. The admission alleged was in the following question and answer: "Question: Well, there wasn't anything that Mr. Brockhouse did that caused you to fall, was there? Answer: No, he done nothing." This statement by the plaintiff that the



defendant did nothing, is not an admission that the place was not dangerous, that the plaintiff selected the unsafe place voluntarily, or that the plaintiff knew or must have known or was chargeable with knowledge of the danger. It is only an admission that the defendant did no physical act to cause him to fall. It is that and that only.

This court cannot say that the verdict of the jury is against the manifest weight of the evidence. As we have said before, "manifest" means clearly evident, clear, plain, indisputable. There is a conflict as to what caused the accident; there is a conflict as to whether the plaintiff assumed the risk in which he was injured. These present questions of fact which were decided by the jury by its verdict. This court will not substitute its judgment for that of the jury.

The judgment of the trial court is therefore affirmed.

Judgment affirmed.

CARPOLL, P.J. and ROETH, J., concur.



General No. 11392

Agenda No. 2

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
May Term, 1960.

FRANK KOSTKA,
Plaintiff-Appellant,
vs.
ERWIN F. KOLARIK,
Defendant-Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
DU PAGE COUNTY.

27 A 13

DOVE, J.

Plaintiff Frank Kostka instituted this suit in the Circuit Court of DuPage County against the defendant, Erwin F. Kolarik, to recover certain real-estate commissions which he alleged were due him from the defendant. By his answer, the defendant denied owing plaintiff anything and the issues made by the pleadings were submitted to a jury. The jury found for the defendant and the Court entered judgment upon the verdict. Thereafter plaintiff filed his post-trial motion for judgment notwithstanding the verdict and for a new trial. Both of these motions were denied and this appeal by the plaintiff follows.

The plaintiff's theory is that he had an exclusive contract with the defendant to sell certain real estate for him, that he produced buyers who were ready, willing and able to purchase this real estate at the price agreed upon by the defendant, and that he was, therefore, entitled to his agreed

commission of \$15,000.00, even though the deal was never consummated. The defendant's theory is that the plaintiff is not entitled to any commission because he never produced buyers who were ready, willing and able to purchase the property on the terms proposed by the owner, the defendant, Kolarik.

By his second amended complaint, the plaintiff alleged that he was a licensed real estate broker, and that on February 26, 1957, the defendant gave him, as a real estate broker, an exclusive sales contract to run for eight months authorizing him to sell the defendant's property located in Hinsdale, Illinois, and called "Chicken Basket Restaurant and Cocktail Lounge" for the price of \$225,000.00. A copy of this contract was attached to the amended complaint. Plaintiff further alleged that pursuant to this contract he procured on or about June 1, 1957, John F. Majors and Carl E. Culp to purchase this property; that these persons were ready, willing and able to purchase the property at a price of \$225,000.00; that defendant, as seller, and Majors and Culp, as purchasers, entered into a written contract dated June 1, 1957, a copy of which was also attached to the complaint; that thereafter this contract was amended, in writing, by the parties thereto which amendment changed the amount of the down payment from \$75,000.00 to \$50,000.00. A copy of this amended contract was also attached to the complaint. It was further alleged that at the time plaintiff obtained Majors and Culp as purchasers of the property, the defendant signed an instrument agreeing to pay the plaintiff for his services in selling the property the sum of \$15,000.00 and a copy of this agreement was also attached to the complaint. Plaintiff then alleged that no part of his claim for commission on the transaction had been paid and demanded judgment against the defendant for \$15,000.00.

By his answer, the defendant neither admitted or denied that plaintiff procured Messrs. Majors and Culp as purchasers of the property but admitted that he did enter into an exclusive sales agreement with the plaintiff. The answer specifically denied that these parties Messrs. Majors and Culp, were ready, willing and able to purchase the property at the price of \$225,000.00.

The record discloses that on February 26, 1957 the defendant executed a sales contract by the provisions of which he granted plaintiff the sole and exclusive right to sell the property involved in this proceeding for the period of eight months at a price of \$225,000.00. It further appears that shortly thereafter plaintiff advertised the property for sale and interested Messrs. Majors and Culp in its purchase.

The plaintiff testified that on Sunday, June 2, 1957 he took these prospective purchasers to the premises and "showed them the whole place, kitchen, basement, stockrooms, ice house, all the Frigidaires and the restaurant and the bar and so forth". This witness further testified that the defendant and also the attorney for the purchasers were present on this occasion and following the inspection of the premises the attorney for the purchasers prepared three documents and dated them June 1, 1957. Copies of these instruments were attached to the amended complaint and the originals were, upon the hearing, offered and admitted in evidence.

One of these instruments recited that the defendant had received from Messrs. Majors and Culp \$5000.00 as earnest money deposit on the purchase of the restaurant and cocktail lounge, together with all other equipment and inventory known as the Chicken Basket and located on Route 66 near 79th Street; that the total purchase price is to be \$225,000.00; that \$75,000 was to be paid in cash and the balance of ~~\$150,000.00~~ ^{\$150,000.00} to be secured by a first mortgage on

the land and building and to be paid at the rate of \$1400.00 per month; that the balance of the down payment, \$70,000.00 was to be paid on or before 30 days and possession would be delivered upon payment of that sum. This instrument was signed by defendant and under the words "Accepted purchasers", Messrs. Majors and Culp signed their names.

After the foregoing document was executed it was modified by the following agreement, viz: "June 1, 1957

"Agreement and part of contract.

"This agreement is part of the contract signed between E. F. Kolarik, proprietor and owner of the Chicken Basket located on Route 66 near 79th Street, Minardale, Illinois, and the purchasers, John F. Majors and Carl E. Culp, for the price of Two Hundred Twenty-five Thousand Dollars (\$225,000.00).

The seller agrees he will sell said premises for said price and convey or cause to be conveyed to the purchaser good title by warranty deed with release of dower and homestead rights subject to prorations. And it is also agreed between the seller and the purchaser that the purchaser will pay Fifty Thousand Dollars (\$50,000.00) cash and immediately take possession of the property and the business. And the Twenty-five Thousand Dollars (\$25,000.00) will be paid to seller within sixty (60) days after the deal is consummated. The difference of One Hundred Fifty Thousand Dollars (\$150,000.00) which will be held by seller as first mortgage, will be paid as follows: One Thousand Four Hundred Dollars (\$1400.00) a month or more including 3% interest until the mortgage and interest is paid in full.

/s/ John F. Majors

/s/ Carl E. Culp

/s/ Erwin F. Kolarik.

The other instrument dated June 1, 1957 and which forms the basis of this action was signed by defendant and recites:

"For and in consideration of selling my business with equipment, fixtures and stock, and my property commonly known as the Chicken Basket Restaurant and Cocktail Lounge on 79th Street and Route 66, Joliet Road, Minardale, Illinois, for the price of Two Hundred Twenty-five Thousand Dollars (\$225,000.00), I, the undersigned owner, will pay Fifteen Thousand Dollars (\$15,000.00) to Frank Kostka, my Real Estate Broker, for services and commission."

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The plaintiff further testified that on June 5, 1957 Mr. Royal, attorney for the defendant called and asked him to bring Messrs. Majors and Culp to the restaurant that afternoon; that the plaintiff, Messrs. Majors and Culp, their attorney, Mr. Schultz, the defendant and his attorney, Mr. Royal, and a Mr. Laseer did meet there and the condition of the septic tank was discussed. The plaintiff further testified that during this discussion Mr. Royal attorney for defendant, took him aside and said they would put in the septic tank if "I would go down \$10,000.00 on my commission and if the buyers would go up \$10,000.00." This witness said he refused to go down a penny; that the deal did not go through and that the property did not change hands and concluded that the deal was not consummated because plaintiff requested an additional \$10,000.00 from the buyers.

John F. Majors, one of the prospective buyers, testified that he and his associate, Carl E. Culp contemplated purchasing the Chicken Basket Restaurant and Lounge; that he contacted the plaintiff and went with him to see the premises. As abstracted this witness continued: "We went through the inside and around the outside of the building and we saw it the second time before we signed any agreement. The first agreement was signed for a \$75,000.00 down payment and the subsequent agreement was for a \$50,000.00 down payment; that the purchase price remained the same at \$225,000.00. I issued a check to Mr. Kostka dated June 1, 1957, for \$5000.00. This check did not go through the bank. We stopped payment because we had a couple of telephone calls to check into the septic system because he was in trouble with the county. We had a meeting about June 5 at the Chicken Basket Restaurant. Mr. Kolarik (defendant) Mr. Royal (defendant's attorney), myself, Carl Culp, Mr. Schultz, our attorney and Mr. Kostka (plaintiff) were present. We disagreed on the price after having found out that the septic system was not in order and that they were in trouble with the county and I thought they

should fix the septic system. Mr. Schalts and Mr. Royal left the room and had a consultation and Mr. Schalts came back and told me if we would add \$10,000.00 to our purchase price they would fix it. I did not agree to pay the \$10,000.00 and that is the reason I stopped payment on the check. Because of the problem with the septic system I refused to proceed under the contract on June 5 and stopped payment on the check. I had an estimate on the cost to connect the septic system and it was better than \$30,000.00. Had they corrected the septic tank matter we were still willing to go through with the deal on the basis of \$225,000.00."

Carl E. Culp testified on behalf of the plaintiff, identified the instruments he had signed, stated that he had, previous to June 1, 1957, gone to the Chicken Basket Restaurant and had met the defendant there and went through the premises with the plaintiff. This witness further testified that he and Mr. Majors were ready on June 1, 1957 to consummate this deal on the basis of the terms of the contracts providing everything was in order as specified in the contracts; that they had received a telephone call that there was some trouble with the county about the sewage disposal not working and that the defendant had received notices from the county about the septic tank and they ascertained that it would cost in the neighborhood of \$25,000.00 to \$30,000.00 to put in a new septic system and that it was costing about \$150.00 per day to get it pumped out. This witness stated that he and Mr. Majors were only ready to proceed with the deal on June 5, 1957 "provided they fixed this septic tank. When we found out there was trouble with the septic system and trouble with the county we stopped payment on the \$5,000.00 check. I felt," continued the witness, "that under the terms of this contract I didn't have to proceed unless the septic tank was repaired because it was misrepresented to us. On two occasions before we signed the contract Mr. Kostka showed us the property and at no time did we discuss it with Mr. Kalarik prior to signing the contract."

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The foregoing is a fair resume of the evidence found in the record. It is apparent that the information Messrs. Majors and Culp had received about the condition of the septic tank caused them to refuse to complete the transaction. It is not contended that defendant made any representations either to the plaintiff or to the prospective purchasers with reference to the septic tank. There is no evidence that the subject was ever mentioned by plaintiff or the prospective purchasers in the presence of the defendant prior to June 5, 1957 which was after the instruments dated June 1, 1957 were executed. While the plaintiff testified that he had not discussed the septic tank with Messrs. Majors and Culp, they insisted that the condition of the septic tank had been misrepresented to them.

The jury by its verdict concluded that the parties to the transaction were not in agreement as to all the terms of the contract and we are unable to say that this conclusion is not supported by the evidence. We would not be justified in setting aside the verdict of the jury and the judgment rendered thereon unless a conclusion opposite to that reached by the jury is clearly evident. (*Ride v. Seibert*, 22 Ill. App. 2d 477, 483).

The issue involved in this proceeding is whether Messrs. Majors and Culp were ready, willing and able to purchase the property involved herein in accordance with the provisions of the contract entered into by the defendant, owner of the premises, with plaintiff, the real estate broker. The purchasers procured by the plaintiff and the defendant entered into the agreements hereinbefore referred to dated June 1, 1957. At that time the accepted purchasers delivered to plaintiff a check for \$5000.00 which was to be credited upon the purchase price. Plaintiff deposited this check in the bank with

which he did business. The check was never paid. The prospective purchasers stopped payment on the check and the plaintiff has that check. The reason this portion of the purchase price did not reach the hands of either the plaintiff or defendant was because the condition of the septic tank had been misrepresented to them but not by the defendant. The jury, we think, under all the evidence found in this record were justified in concluding that the plaintiff did not produce purchasers who were ready and willing to purchase the premises according to the contract executed by defendant.

Counsel also argue that the trial court erred in refusing to admit in evidence a photograph of the Chicken Basket Restaurant and erred in refusing to permit plaintiff to state who prepared one of the written instruments dated June 1, 1957. These matters were immaterial to any issue in the case and were properly excluded.

It is also insisted that the trial court erred in sustaining an objection to a question put to plaintiff by his counsel asking the witness to explain the difference between the two written instruments signed by the defendant and the prospective purchasers on June 1, 1957. These instruments had been offered and received in evidence and read to the jury. They were not ambiguous and from a consideration thereof the meaning of each could readily be ascertained. Furthermore the plaintiff did testify that defendant "wasn't present when we prepared these documents affecting a change in the down payment and when I went there he (Kolarik) signed it. He asked me to prepare the document as to commissions and also with reference to the down payment. The buyers asked for the change".

It is finally insisted that the court erred in refusing to give to the jury plaintiff's tendered instructions numbered 4, 5, and 6. The post-trial motion filed by the plaintiff states that the court erred in

refusing to give instructions numbered 1, 2, 3, 4, and 5 asked by the plaintiff. The abstract of the record prepared by plaintiff's counsel sets forth, and thirteen instructions and indicates that seven were tendered by the defendant and six by the plaintiff and that plaintiff's instructions were numbered 1 to 6 inclusive. Plaintiff's instructions 1, 2 and 3 are marked given as tendered. Plaintiff's instructions No. 4, 5 and 6 are marked refused.

We have examined all of the instructions. The seven tendered and given at the request of the defendant are not objected to and they, together with the three instructions tendered and given at the request of the plaintiff when considered together, substantially presented the law of the case fairly to the jury and this is sufficient. (*Ritsman v. The People*, 110 Ill. 362, 372.) What was proper to be given in the refused instructions was contained in those given to the jury.

There is no reversible error found in this record and the judgment of the circuit court of Du Page County is therefore, affirmed.

Judgment affirmed.

McNEAL, P.J. CONCURS.

SMITH, J. CONCURS.

MATTIE ADKINS and
HORACE ADKINS,

V.

Defendants-Appellees.

471431

The plaintiffs, Horace and Mattie Adkins, complain that a verdict, returned in their favor, was for grossly inadequate damages and was influenced by errors induced by the defendants.

Adkins, the driver, was only slightly injured but his wife, who was seated next to him, was taken to a hospital in an ambulance. He lost a day or two of work, as a carpenter, because of headache, and missed a few more days because of the lack of transportation for himself and his carpenter tools. Mrs. Adkins remained in the hospital eleven days. For months thereafter she continued to suffer neck, rib, arm and back pains. A specialist, whom she

consulted six months after the accident, testified an x-ray showed that she had a fracture of her cervical spine, although he could not say this occurred in May of 1953. The jury awarded \$200.00 damages to Adkins and \$500.00 to Mrs. Adkins. The latter sum was less than her medical bills.

Although they denied liability, the defendants presented no evidence concerning the occurrence. All the putative errors arose during cross-examination of witnesses for the plaintiffs or during the examination of Adkins as an adverse witness.

To refresh his memory, a doctor who had attended Mrs. Adkins in the hospital was shown the hospital record which had been marked for identification as a plaintiffs' exhibit, but which had not been offered or received in evidence. During cross-examination the record was used not only for the purpose of refreshing his memory but for other purposes as well. Over objection the court directed him to read the report of a radiologist, and the defendants' counsel asked him questions concerning nurses' entries in the record, such as:

Q. "What does it say?"

A. "The nurse shows a good day; that's all."

Q. "About that, 'no specific complaint' isn't that right?"

A. "That's what it reads."

Q. "'Ate well' is that it?"

A. "Yes, sir."

. . . .

Q. "And 'a good day' did she say that?"

A. "Yes, sir."

. . . .

Q. "Do you find anything but those specific complaints — 'ate well,' 'good night,' 'good day'...?"

. . . .

A. "According to the nurse's notes, yes."

. . . .

Q. "According to the nurse's note, she was in good shape, wasn't she?"

. . . .

A. "Yes, comfortable."

All this evidence was inadmissible. It was hearsay and came within no exception to the hearsay rule. Kooyumjian v. Stevens, 10 Ill. App. 2d 378.

Adkins was called as an adverse witness and questioned about a visit he made to the defense attorney's office. Over objections he was asked questions about his offer to settle the case. The injection of this evidence was improper. Despite its being termed "vital" by the defense attorney, there was no showing that any part of the conversation was an admission against interest or was material to any issue in the case. Attempts to settle law suits are commendable and should be encouraged. A party who tries to adjust his dispute should not be prejudiced before a jury by an implication that his effort indicates weakness or suggests

a lack of confidence in the outcome of his case. Hill v. Hiles, 309 Ill. App. 321.

In 1957 the plaintiffs were involved in another collision and Mrs. Adkins was again injured. Her injuries were similar to those she received in the first accident. Defense counsel interrogated her and one of her doctors extensively about these injuries. It was proper for him to do so inasmuch as it was claimed that her headaches and the condition of her back at the time of the trial were caused by the injuries of 1953. It was competent for him to ascertain if her current condition of ill-being resulted from the second rather than the first accident. However, he went further and, over objection, asked her if the second case was settled and the amount of the settlement. He had her identify a copy of the check which had been paid and had her read aloud all its details. This testimony was irrelevant. It had nothing to do with either the cause or the extent of her injuries.

These errors, together with the manifest inadequacy of the verdict, make it necessary that a new trial be had. However, the entire case does not have to be re-tried. As we have mentioned, there was no evidence contesting the issue of liability. Therefore, a new trial is ordered upon the issue of damages only. Harris Furniture Co. v. Morse, 10 Ill. 2d 28.

Reversed and remanded
with directions.

Schwartz, P.J., and McCormick, J., concur.

ABST.

47815

HENRY L. SWEITZ and MARGARET J.
SWEITZ,

Appellants,

v.

CHICAGO TITLE AND TRUST COMPANY, a
corporation, as Depositary under Escrow
No. 239475, defendant; and MARSHALL A.
LEVY, doing business as FEDERAL FINANCE
ASSOCIATION,

Appellee.



APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order dismissing an action for a declaratory judgment, which we believe is rendered moot by the opinion and judgment of this court, filed this day, in Sweitz v. Levy, No. 47817.

We conclude that a decision on the merits in the instant appeal is unnecessary and, therefore, it is hereby ordered that said appeal be and it is hereby dismissed without prejudice.

DISMISSED.

KILEY AND BURMAN, JJ., CONCUR.

ABSTRACT ONLY.

FILED SEPT. 17, 1960

General No. 11402

Agenda No. 8

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION

May Term, 1960

JOSEPH MCGRAW,

Plaintiff-Appellee,

vs.

KATIE GAVIN and
DEMORE FIGEE,

Defendants-Appellants.

Appeal from the
Circuit Court of
Will County.

271A-62

DOVE, J.

This case arose out of an automobile accident which occurred at the intersection of Doris and Gardiner Streets in the City of Joliet. As a result of the collision of the two automobiles which were involved, Joseph McGraw, the plaintiff, who was driving the car westerly on Doris Street was injured. The other automobile involved in the collision was owned by defendant, Mrs. Katie Gavin and was then being driven by defendant Demore Pigeo. The issues made by the pleadings were submitted to a jury resulting in a verdict and judgment for \$15,000.00 in favor of the plaintiff and against both defendants, who appeal.

The record discloses that Gardiner Street, is a paved, two lane through street running in a northerly and southerly direction and having a gravel shoulder fifteen feet wide along its east edge. Doris Street is a gravelled black top highway and runs in an easterly and westerly direction.

FIELD NO. 1000

1000

A Standard Oil Filling Station was located at the southeast corner of the intersection of these streets and a stop sign was located on a tree at the north side of Doris Street six or seven feet east of the intersection.

At about seven thirty o'clock on the morning of October 5, 1956 the plaintiff, accompanied by his mother-in-law, Marie Bertino, was driving a Chevrolet automobile on Doris Street and approaching the intersection from the east. At the same time Demore Pigeo, accompanied by his sister-in-law Katie Gavin, was driving the Ford automobile belonging to Mrs. Gavin, in a northerly direction on Gardiner Street. Mrs. Gavin was sitting at the right of Mr. Pigeo on the front seat and in the back seat were the wife and baby of Mr. Pigeo. It was a nice, pleasant morning and, according to the testimony of Mrs. Bertino, plaintiff had stopped the car he was driving in the gravel on Doris Street East of the paved portion of Gardiner Street. She was unable to state how far east of the pavement or how long they had been stopped before the collision occurred. As abstracted by counsel for appellant this witness then testified: "I think it was about seven-thirty in the morning. I was seated in the front seat beside him (Mr. McGraw). We travelled west on Doris to Gardiner and we stopped. Gardiner is a stop-street for traffic on Doris and we stopped at the gravel off the road on Doris Avenue. We stopped there and I was looking south and I see this car coming so fast and I said to my son-in-law, look Joe, look like we getting hit." This witness was then asked by counsel for plaintiff: "When you saw the car coming towards you was it on the pavement?" The witness answered: "No." She was then asked "Where was he (defendant, Pigeo) driving?" She answered: "On the gravel."

Mr. Pigeo testified that upon the occasion in question he was traveling about 35 miles per hour proceeding north on Gardiner Street; that as he approached the Doris Street intersection and was at a point 100 feet south of it he first saw the McGraw car; that he, Pigeo, thought the McGraw

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continued this witness:
car was going to stop but "evidently he didn't. I was too close on him to stop, to keep from hitting him. I applied my brakes when he didn't stop. I hit him on the left side. My left side hit him. My car turned before it got there. The impact occurred in the middle of the intersection. My car skidded about twenty, thirty feet. My car turned around about a half turn. My car did not go off the road near the gas station. I turned my wheels to the right. He was across the intersection and I tried to avoid him by cutting into Doris Street. After the accident my car was headed east on the South section of Gardiner".

John Ervin testified that he operated the Standard Filling Station located on the southeast corner of Doris and Gardiner streets; that from his station to within fifteen feet of the pavement on Gardiner Street there was black top; that the fifteen foot shoulder just east of the pavement on Gardiner Street was gravelled; that he had just arrived at the station upon the morning in question and did not actually witness the collision; that he was in the rear of the station when he heard the screech of brakes followed by a crash. As abstracted this witness then continued: "I ran out and looked. I called the police and stood outside the station and saw the two cars involved in the accident. The car that got hit was the Chevrolet (the McGraw car), and the other car was a Ford. The Chevrolet was traveling at a forty-five degree angle and it was in a kind of northwest position. The Chevrolet got hit on the driver's side, the left side. The Chevrolet wasn't on Gardiner. It was still on Doris Avenue. It wasn't on the intersection as yet. It was five or six feet or maybe further away from the hard road. There were skid marks from the car coming down Gardiner Street. They were on the hard road and went off into the gravel on the right side of the highway near my station."

Mrs. Gavin testified that she owned the Ford Car which was being driven by her brother-in-law, Mr. Pigeo, upon the occasion in question; that she was in the front seat on the right hand side; that they were proceeding north on Gardiner Avenue not over thirty-five miles per hour; that when about twenty feet from the intersection of Doris Street she saw the car driven by the plaintiff coming from the right on Doris Street; that there was a stop sign there but the car did not stop and continued across Gardiner Avenue in front of the car in which she was riding; that her driver applied the brakes but some gravel had sifted on the highway and the car "skidded or something".

The only witness called by defendant was Robert Anderson. Mr. Anderson testified that he was a Police Officer in Joliet and investigated this accident; that when he got to the scene of the accident both cars were near the northwest corner of the intersection; that the Pigeo car was facing south and the McGraw car facing northwest; that dirt had dropped upon the pavement from the undercarriage of the automobiles and he determined from this that the Chevrolet car was partially on the Gardiner Street pavement.

As a result of the collision the plaintiff was rendered unconscious and he testified that he never regained consciousness until several days after the accident and that he had no recollection of anything which transpired on October 5, 1956.

The foregoing is a fair resume of the evidence relating to this occurrence. It is insisted by counsel for appellant that the evidence does not support the verdict; that the judgment is excessive; that the court ruled improperly on the admission of evidence and in the giving of instructions and that the court also made prejudicial remarks and comments during the course of the trial.

Counsel for appellee contends that the verdict is supported by the evidence; that no reversible errors occurred during the trial of this case and that the judgment is not excessive. Counsel insists that the evidence found in this record tends to prove that the car driven by Mr. Pigeo approached the intersection at a high rate of speed, slipped off the east edge of the Gardiner Street pavement and proceeded in a northerly direction on the gravel shoulder and struck the Chevrolet car while it was stopped.

Whether the car which plaintiff was driving had stopped on Doris Street at the time of the collision or whether that car was in motion at the time of the impact and whether the impact occurred in the paved portion of the intersection or upon Doris Street or on the gravel shoulder east of the paved portion of the intersection were controverted questions of fact. Mrs. Bertino's version of the occurrence was that the car driven by the plaintiff had come to rest on Doris Street on the gravel approach to the paved portion of Gardiner Street east of the intersection and that while so stopped, the Ford car, owned by defendant Gavin and driven by defendant Pigeo, struck their car. Her version of the occurrence was corroborated in part by the testimony of John Ervin, the service station manager. The issues of defendants negligence and plaintiff's due care were factual questions. The verdict of the jury has support in the evidence found in this record and the judgment rendered on the verdict must be affirmed unless the judgment is excessive or unless errors occurred upon the trial of the cause, which deprived appellants of a fair trial.

During the examination of Mrs. Bertino she was asked by counsel for the plaintiff whether after the accident she got to the home of her son. The witness answered: "No, I wait here. I get down from the car and I waited until policeman come and policeman say to this man ____". At this point counsel for defendants interposed an objection. Whereupon the court said: "I will sustain the objection and I ask you to sit in your chair, Mr. Gies and not cause any more trouble. You keep interrupting before the question is asked and the answer finished."

It further appears that quite frequently during the cross examination of Doctor Faulkner, counsel for appellant, Mr. Gros, would interrupt him before he had completed his answer to the propounded question. Following one of these instances the court said to Mr. Gros: "You have been asking the doctor questions and long before he gets through answering you have been interrupting him. He is entitled, as a witness to answer the question that you propound to him. He is to be given that opportunity and not just answer the portion you want him to answer."

On direct examination of Doctor Faulkner by Mr. Feshan, counsel for the plaintiff, ~~the court asked the witness~~ Mr. Feshan asked the witness if there was a medical term for the loss of memory? The doctor answered: "Yes, amnesia". The doctor was then asked: "Does that relate to a brain concussion?" Mr. Gros objected and the witness answered: "I would relate it to the concussion of the brain". The witness was then asked: "Now Doctor, from your examination on the date of the accident, and from your subsequent treatment, your diagnosis of concussion with amnesia, and complaints of recurrent headaches do you have an opinion as to the permanency of this injury?" Mr. Gros then said: "I object to the doctor answering anything beyond whether he has an opinion, yes or no, without giving the opinion". The witness then answered in the affirmative and in reply to counsel's question to state that opinion answered: "Of course he had amnesia at the time of the concussion, due to the concussion of the brain. In other words, it leaves a concussion, rather the concussion causes amnesia. Of course there is a vascular affair and that is a disturbance in the blood vessels, caused by a jar of the brain, in which you get a stasis". At this point Mr. Gros interrupted the witness and objected to the answer as not being responsive. This objection was overruled and the witness continued: "You get a stasis because of the edema present."

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Now with a concussion of the brain, it is not unusual to get amnesia, in fact, it is very common, but that is a temporary affair because the cells that are affected reliven or regenerate. Then, of course, there is no damage done, but if you get destruction of cells, usually due to damage to the capillary, minute capillaries supplying certain areas of the brain, like in this case, a free frontal area of the brain, you do not get whole destruction, but you get destruction of a few cells, nobody knows how many, but that is the case that leaves permanent amnesia in which case they remember nothing pertaining to that time". The Doctor then went on to state that because memory had not returned to plaintiff three years after the accident he was of the opinion that there was permanent destruction of the cells of the brain. No objections were made by counsel to the question or answers except as we have indicated. The Doctor was then asked this question: "Doctor, would you rule out, given the consideration we have discussed, any future disability resulting from this occurrence?" A general objection as to the form of the question was interposed and overruled and the witness answered: "No, I wouldn't rule out anything in the future, anything could happen."

During the cross-examination of Doctor Faulkner, counsel for defendant, Mr. Gros, handed the witness what was subsequently identified as a hospital record and the witness was asked to refresh his recollection by the record and state the days and kind of treatment the Doctor had ordered. The witness replied: "There was no treatment-----". The court interrupted the witness and said that the document which counsel had handed the witness had not been identified for any purpose. Mr. Gros replied: "This hospital record was subpoenaed". The court then said: "You know better than that. I want to know whether it is defendant's Exhibit 1 or 6 or 100". Mr. Gros then said: "I am sorry". The court replied: "You are not sorry. Identify the exhibit". The exhibit was then identified and the cross-examination, continued.

The record further discloses that during the course of the final argument counsel for appellee said to the jury: "Mr. McGraw is thirty-three years old. I suppose he has, in these days, forty years life expectancy, which amounts to many thousand of days, thousands of days in which he will be faced with the anxiety of knowing that he is not the same fellow that he was before the fellow came off the road and hit him. His brain cells were destroyed and his doctor said he couldn't rule out anything that might result from a head injury. The head injury is there, that is a fact". Counsel for appellant interrupted and said: "I don't think this is proper rebuttal." The court then said: "Proceed Mr. Feehan. Don't interrupt without reason, Mr. Gros". Counsel for appellee resumed his argument and referring to the plaintiff said: "He has a life expectancy of forty years -----". Counsel for appellant objected again whereupon the court said: "Overruled. Proceed." Counsel for appellee then said: "I ~~supposed~~ didn't mean to imply there was -----". At this point counsel for appellee was again interrupted by Mr. Gros, counsel for appellants, who said: "I object. The argument should be based on evidence". The court replied: "Unless you have some real reasons to make objections, you should not take the time of counsel to object. You have had your opportunity. We are attempting to go along in a rather proper manner as I see the case and Mr. Feehan has the same opportunity as you had to argue this case to the jury. Continue Mr. Feehan."

The rulings of the trial court during the course of the trial in the foregoing instances are complained of by counsel for appellants. Counsel insists that the statements made by the court were highly prejudicial and unwarranted and that the court imputed the motives of counsel. Counsel insist that the court displayed animosity and ill-will toward counsel which tended to demean counsel in the eyes of the jury.

We have read not only the abstract of the record but also the record itself. Counsel for defendant's statement, during his cross-examination of Doctor Faulkner, to the effect that the hospital record had been subpoenaed did not merit the reply of the court, ~~that~~ "You know better than that". Nor immediately thereafter when counsel for defendant said to the court, "I am sorry", the court was not justified in replying: "You are not sorry". Perhaps the tactics and manner of defendant's counsel sorely tried the patience of the court. These statements by the court, however, so far as the record discloses, appear to be uncalled for. It is always the duty of the trial court to show due respect and consideration to an attorney while engaged in the trial of a case and in no way manifest hostility toward him. "Patience and gravity of hearing is an essential part of justice". (People ex rel. v. Harrington, 301 Ill. App. 185, 189, 190).

In Forrest Preserve District v. Wike, 3 Ill. 2d 49 it was insisted that the trial court made prejudicial statements in the presence of the jury. ^{In the opinion} The objected to statements are set forth and in connection therewith the court said (p. 58) "We have often said that the trial court has a wide discretion in the conduct of the trial, but it must not invade the province of the jury by making comments or insinuations suggesting the belief or disbelief in the integrity of the lawyers conducting the trial. While we do not commend the extraneous comment on the part of the presiding judge, none of his remarks were objected to, nor was exception taken during the trial, nor any motion made to strike out such remarks as counsel properly should have done (Forrest Preserve District v. Chicago Title and Trust Co. 351 Ill. 48). We feel that counsel ^{the} for appellants have attempted to place a strained construction and interpretation upon the unnecessary remarks of the presiding judge made during the course of the trial. We cannot agree that the conduct of the court constituted a hostile attitude toward the attorneys ^{the} for appellants or that it was prejudicial to one side or the other".

In the instant case at no time did the trial court make any statement or utter any word which in any way disclosed the court's views on the merits of the case nor did the court express any opinion on the evidence. In many instances, the record discloses, the court was most considerate of counsel and carefully safeguarded every right of his client to a fair trial. In our opinion the court did not impugn the motives of counsel nor were the remarks made by the court so prejudicial as to require a reversal of this judgment.

The court's ruling in sustaining an objection to this hospital record when offered by counsel for defendant during his cross-examination of Doctor Faulkner and before plaintiff had closed his case in chief was proper. This exhibit, however, was again offered in evidence by defendant after plaintiff closed his case. The abstract prepared by counsel for appellant discloses that this hospital chart was admitted in evidence as "defendant's exhibit # 1 over objection by defendant (ab. p. 65). The record, however, discloses that after plaintiff had closed its case the following occurred, viz: (Record pp. 250-253). "Mr. Green: I make a motion asking the court to admit in evidence Defendant's Exhibit One". After an objection by counsel for plaintiff and after counsel for defendant stated he would remove the face sheet which counsel for defendant said was merely a summary of the information the jury already had, the court said (Record p. 253) "Let the record show that Defendant's Exhibit One will be admitted in evidence except for the first sheet thereof, known as the summary, which shall be detached from said exhibit. The reporter will remark the exhibit as Defendant's Exhibit One".

It is also insisted that the court erred in permitting Doctor Faulkner to testify as to the permanency of plaintiff's injuries. Doctor Faulkner was plaintiff's treating physician. He had testified, without objection, as

what his examinations of the plaintiff had disclosed and stated there was a permanent destruction of brain cells. He was then asked: "Doctor, would you rule out, given the consideration which ^{we} have discussed any future disability resulting from this occurrence?" Over the objection of counsel for defendant, as to the form of the question, the Doctor replied: "No, I wouldn't rule out anything in the future, anything could happen." There was no motion to strike this answer and the examination proceeded.

In support of the contention that the objection to this question should have been sustained counsel cite *Gaydos v. Peterson*, 300 Ill. App. 219, 227. In that case a question was propounded the witness inquiring whether he had an opinion and called for an affirmative or negative answer. The witness, a medical expert, who had examined the plaintiff the night before the hearing for the purpose of testifying on the trial did not give an affirmative or negative answer but gave his opinion. Counsel for defendant moved to strike the answer and this motion was denied. The appellate court held that the trial court erred in not sustaining counsel's motion to strike the answer as the answer disclosed that all the doctor had in mind was a "possibility, a conjecture, a mere speculation and the answer, if for no other reason should have been stricken as unresponsive". In the instant case the treating physician was merely stating that future disability should not be ruled out or that the brain damage already suffered would not be lessened. This evidence was not speculative. Furthermore no motion was made to strike this answer and the record therefore does not save this ruling for review. (*Wondoraki v. Ill. Steel Co.*, 160 Ill. App. 390).

It is also insisted that the trial court erred in entering an order on the morning of the second day of the trial directing counsel for appellants, Mr. Gros, to produce his clients at the afternoon session of the court. No objection or exception was made by counsel at the time this order was entered

and under the circumstances disclosed by the record no question as to the propriety of the entry of this order by the trial court is before us for review. What the record discloses, however, is this. This cause was then called for trial on October 28, 1959 and after the jury had been examined and impanelled and the opening statements made by counsel the court recessed until the following morning. When court convened the next morning, Mr. Peahan counsel for plaintiff, stated that he intended to call the defendants for cross-examination under section 60 of the Practice Act but they did not appear to be present. The court then asked Mr. Gros: "Where are the defendants?" Mr. Gros replied that they could be subpoenaed. The court then inquired whether they were going to appear and Mr. Gros answered that he was not certain. The court then said: "You don't know whether your clients are going to come to court or not?" and Mr. Gros replied: "That is right."

Counsel for plaintiff then called Mrs. Bertino and the taking of testimony commenced. At the morning recess and outside the presence of the jury counsel for plaintiff made a motion for an order directing counsel for defendants to produce his clients for examination under section 60 of the Practice Act or if that right was denied plaintiff, that then defendants be barred from testifying in their own behalf. During the discussion which followed counsel for defendants stated that the defendants were available and that he intended to bring them in but would prefer to put off their appearance until the following day and insisted upon a recess until the following morning.

From what transpired during the colloquy between court and counsel the court would have been justified in concluding that counsel for defendants sought to unnecessarily delay the trial of the case and there was no abuse of discretion when the trial court entered an order directing Mr. Gros to produce Katie R. Gavin in court at 1:30 p.m. that afternoon and to produce

Bemore Pigue at 2:30 p.m. that day.

In *Bauer v. Bauer*, 177, Mich, 169, 142 N.W. 1074 it appeared that the plaintiff in a divorce proceeding was not present in court at the time the cause was heard. After several witnesses had testified on behalf of the plaintiff, counsel for defendant moved the court for an order directed to the plaintiff and requiring him to appear in court for examination by defendant's counsel. The trial court refused to enter the order and the supreme court of Michigan in affirming the decree granting plaintiff a divorce stated that, had plaintiff been present in court, defendant might have called and examined him as a witness. "But" continued the court, "there is no rule which requires parties to a suit to attend court during the trial. If the testimony of a party is desired by the opposite party attendance at the trial may be secured by the process of the court or a deposition may be taken as in other cases".

In *Aircraft Radio Industries v. Palmer Inc.*, a Washington State case, reported in 277 P. 2d 737 the court said that under "the present rules of civil procedure, the physical presence of a party to a law suit at the trial of the cause can be compelled only in the same manner as any other witness".

The author of the article on witnesses in *Corpus Juris Secundum* says: "In order to compel the attendance of a witness at a trial or hearing he must be subpoenaed even though he is a party to the cause; but where a party purposes to testify in his own behalf it is his duty to attend without a subpoena. It has been held that where a party or even a third person, is present in court, he can be called on and forced to testify without subpoena". (97 C.J.S. Title Witnesses,

sec. 20, pp. 370, 371). In the instant case at the appointed time the defendants were present in court and were called and examined by counsel for the plaintiff under section 60 of the Practice Act and the trial concluded. Appellants were in no way prejudiced by the entry of the order complained of and in the state of the record are in no position to complain.

It is also insisted that the verdict of the jury is excessive indicating prejudice and ill-will against the defendants. It appears that at the time plaintiff received the injuries complained of he was 31 years of age and employed at McGraw foundries as a drop forge hammer operator. He was earning \$80.00 per week. Formerly he had worked for more than a year as a department manager at Goldblatt's and has also worked at the Caterpillar Plant in Joliet. The accident happened Friday morning about seven-thirty o'clock. He received a head injury and as a result thereof was rendered unconscious and so remained until the following Sunday. He was taken from the scene of the accident to St. Joseph's Hospital in Joliet and his family physician, Doctor Faulkner was called, examined him, had x-rays taken of his head and left shoulder. His brain was injured; his head and body ^{were} sore and he suffered extreme and continuous pain in his head and these headaches continued for more than two years. He has no recollection of anything which occurred the entire day of October 5, 1936. He was removed from the

hospital on October 14, 1956 to his home and while there his headaches continued and he received treatments from Doctor Faulkner on at least a dozen occasions. Early in November he was able to return to part-time "non-productive" work at the McGraw foundations. The repairs to the automobile, his hospital and doctor bills aggregated \$781.82.

Counsel for appellant recognize that the question of damages is one of fact for the jury to determine and that the jury's assessment will not be set aside unless clearly the result of passion and prejudice. We have read the cases cited and referred to by counsel for both sides. We think the verdict is large but in 15 I.L.P. Damages, sec. 175, p. 560 it is stated that "an injury to the head, if permanent, will authorize a jury to award a substantial amount of damages, particularly where there is a concussion which has permanent effects." While the judgment is ^{substantial} ~~damages~~ we should not substitute our opinion for the judgment of the jury and under the evidence found in this record we would not be justified in requiring a remittitur.

It is also insisted that the judgment against Katie Gavin should not be permitted to stand. The complaint charged that this defendant owned the car involved in the collision which was then being driven by Demore Pigeo, her agent and servant. The evidence is that Mrs. Gavin did own the car; that Pigeo was her brother-in-law; that he wanted to use the car and she consented and as she desired to go downtown upon the morning in question she accompanied him and was riding in the front seat with him when the collision occurred. While Pigeo intended to drive Mrs. Gavin's car into Chicago ~~using the car~~ ~~intentionally~~, he Pigeo, was certainly her agent and servant and its operation was under her control until she arrived at her destination downtown. She had not reached this place at the time of the collision. The jury found both

defendants guilty. The issue whether Pigee was or was not the agent or servant of Mrs. Gavin at the time of the collision was a question of fact and was submitted to the jury under proper instructions. (Parrino v. Landon 8 Ill. 2d, 468, 470; 4 I.L.P. 472).

We have examined the one given instruction of which appellants complain and do not believe it is subject to the criticism directed against it. And it was not error for the court to refuse defendants' tendered instruction No. 15. It refers to "negligence in manner and form as charged in the complaint". In the absence of any instruction as to what charges of negligence were made in the complaint this instruction was improper.

Finding no reversible errors in this record the judgment of the circuit court of Will County is affirmed.

Judgment affirmed.

McNEAL, P.J., CONCURS.

SMITH, J., CONCURS.

27 I.A. 2nd 127

PIPER v. PIPER GENERAL NUMBER 10,295
THIRD DISTRICT. September 22, 1960

Missing.

premises at least forty times to adjust the machine. The chancellor

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
MAY TERM, A.D. 1960

ABE LEVIN, HERMAN LEVIN and
WILLIAM LEVIN, co-partners, d/b/a
ROSS SYSTEMS,
Plaintiffs-Appellants,
vs.
WARREN G. SIVER,
Defendant-Appellee.

Appeal from the
Circuit Court,
Lake County.

271A 134

McNEAL, P.J.: -

This is a suit brought on a contract. On September 19, 1955, plaintiffs sold certain equipment to the defendant and also leased to him a Dari-Delite Freezer for a term of 10 years. Defendant paid plaintiffs \$5000 and agreed to pay them 25¢ for each gallon of mix used in the freezer and an additional 3¢ per gallon for advertising. The defendant agreed not to use any other type of freezer. Defendant used the freezer and paid royalties until June of 1957, at which time he refused to use the freezer any longer and purchased a different type of freezer. Plaintiffs then brought this suit for specific performance, an injunction and an accounting.

At the trial defendant produced evidence that he should have received a new freezer, whereas the one sent to him was a used one. Also a number of witnesses testified that the freezer did not operate properly from the time defendant received the freezer until he ceased using it. They testified that it would freeze up when customers were waiting in line to be served. Plaintiffs produced evidence in direct conflict with defendant's evidence, but one of plaintiffs' own representatives testified that he went to defendant's premises at least forty times to adjust the machine. The chancellor

who heard the evidence found that plaintiffs should have furnished defendant with a new rather than a used machine. He also found that plaintiffs had failed to fulfill their obligation to furnish a workable machine, i.e. a machine fit for the use contemplated by the parties. The chancellor accordingly dismissed the complaint for want of equity and this appeal followed.

Our attention has been called to *Barnett v. Kennedy*, 315 Ill. App. 28, and *J. P. Seeburg Piano Co. v. Linder, et al*, 221 Ill. App. 94. In the *Barnett* case plaintiffs sold a Twin United Stoker to the defendant to be used in connection with his laundry business. Evidence was presented that the stoker did not operate properly and a finding that the stoker failed to perform the duties for which it was purchased was affirmed on appeal. The *Linder* case, which involved an organ, is to the same effect. It is true that these two cases involve the sale of chattels, whereas the instant case involves the lease of a chattel, but the general rule appears to be that the lessor of a chattel also impliedly warrants that the chattel is reasonably suited for its intended use. See 68 ALR 2d 845, 854; 31 ALR 596, 541.

Such being the case, the only question before this court is whether the chancellor's finding that the freezer was not suited for its intended use is contrary to the manifest weight of the evidence. The settled rules which govern courts of review in deciding this question were recently restated in *Bude v. Seibert*, 22 Ill. App. 2d 477, 483, as follows:

"The trial court, and not this court, was in a position to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof. We may not overturn this judgment merely because we might disagree with it or might, had we been the trier of facts, have come to a different conclusion. We cannot substitute our opinion for that of the trial court as to the facts unless such trial court's finding is manifestly against the weight of the evidence. *South Parkway Bldg. Corp. v. South Center Department Store, Inc.*, 19 Ill. App. 2d 14, 28, 153 NE 2d 291; *Chicago v. Atkins*, 19 Ill. App. 2d 177, 182, 153 NE 2d 302. 'Manifest means clearly, evident, clear, plain, indisputable.' *Schneiderman v. Interstate Transit Lines, Inc.*, 391 Ill. App. 143, 147, 72 NE 2d 705. It requires that an opposite conclusion be clearly evident. *Arboit v. Gateway Transp. Co.*, 15 Ill. App. 2d 500, 507, 146 NE 2d 582."

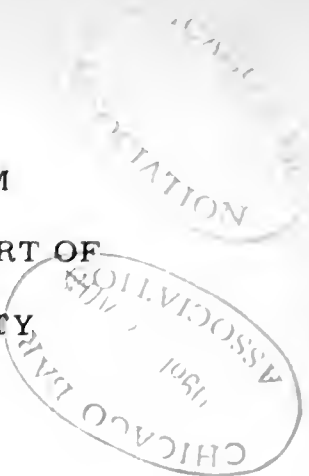
We have studied the record in this case with the above principles in mind and it is our conclusion that the chancellor's finding that the freezer in question was not suitable for its intended use is not contrary to the manifest weight of the evidence. Accordingly we find that the decree entered by the Circuit Court of Lake County should be and it is affirmed.

Decree affirmed.

DOVE and SMITH, JJ., concur.

THE GERSTEL AGENCY INC.,)
)
Appellee,)
)
vs.)
)
EDWARD GRUSIN,)
Appellant.)

APPEAL FROM
CIRCUIT COURT OF
COOK COUNTY



MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

27 LA 249

Judgment was confessed for the full amount of a cognovit note including

interest and attorney's fees. Upon motion of defendant the judgment was opened

and after a hearing the amount of the judgment was modified and reduced.

Subsequently, plaintiff filed a petition in the same cause to receive additional

sums due on the note and after a hearing the court entered a second judgment,

including interest and attorney's fees, and it is from the latter judgment defendant

appeals.

On March 6, 1959, the Gerstel Agency, Inc. obtained a judgment by confession

in the Circuit Court against Edward Grusin for the sum of \$2025.00, which in-

cluded a claim of \$1850.00 for principal and interest together with an allowance

of \$175.00 attorney's fees.

The judgment is based on default of an interest bearing cognovit note

executed on September 18, 1957, by Edward Grusin in the amount of \$1875.00

payable in installments of \$25.00 per week, commencing seventy-five (75) weeks

after date.



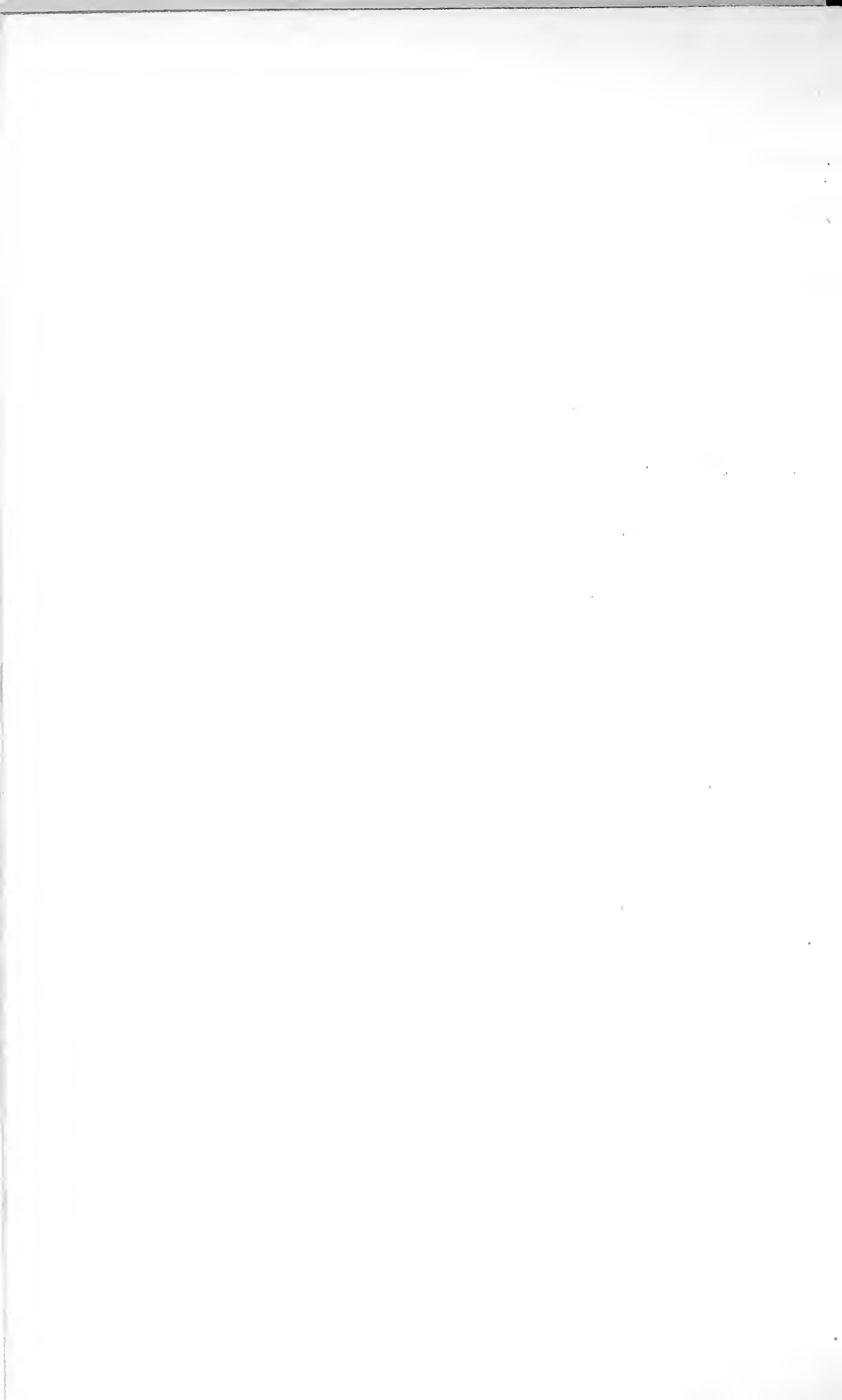
Defendant moved to vacate the judgment and in his affidavit alleged affirmatively that "there was no legal consideration passing from the Defendant to the Plaintiff for the execution and delivery of said note in that the Defendant agreed to make the payment thereunder upon the condition that the Plaintiff make certain other payments which the Plaintiff has failed to do. . . ." On May 28, 1959, after a hearing, the judgment was modified and reduced to the sum of \$352.50, including attorney's fees of \$52.50. The order recited that the judgment was based on moneys due on the note up to and including May 28, 1959, and stated further "that said reduction is without prejudice to the rights of plaintiff under said note for any payments to become due thereon subsequent to May 28, 1959." This order was approved by the parties through their respective attorneys and the judgment paid.

On November 9, 1959, with permission of the court, the plaintiff filed a petition in the same cause requesting judgment for further installments which had become due on the same note since May 28, 1959, including a request for interest and attorney's fees. On defendant's motion the matter was continued. A subsequent order gave defendant twenty days to file an answer. In his answer the defendant alleged that the first judgment exhausted the warrant



of authority to further confess on the note and that the petition "sounds in contract and not by way of this action. " Defendant reiterated that no consideration passed between the parties in that the defendant agreed to make payments under the note conditional upon the plaintiff making other payments which plaintiff failed to do. On December 28, 1959, after a hearing, the court entered a judgment for \$883.11. This order recited that the judgment was based on monies due on said note from May 28, 1959, to and including December 24, 1959, and further recited that "said judgment is entered without prejudice to the rights of this Plaintiff to enter judgment herein for the future payments due on said note after December 24, 1959. "

Defendant contends that once a valid judgment is rendered on a confession of judgment note, the warrant of attorney is exhausted and the plaintiff may not proceed further by way of confession. The cases cited by defendant on this contention are not applicable here inasmuch as the second judgment was not entered by way of confession. The parties appeared by petition and answer and the defendant after due notice had his day in court as he would have in an action at law.



Defendant further argues that upon the entry of the first judgment the court's jurisdiction ceased. We disagree with this contention. In determining the propriety of trials each case must be viewed in the light of its own peculiar facts. The plaintiff by filing his petition treated the litigation as a continuing action. The defendant appeared and asked for a continuance. He did not file a special appearance for the purpose of contesting the jurisdiction of the court. By proceeding in this manner defendant waived all objections to the jurisdiction of his person. *Welter V. Bowman Dairy Co.*, 318 Ill. App. 305. Further, the original judgment was for the full value of the note, and it was reduced only by both parties agreeing that plaintiff could proceed further for any subsequent installments remaining unpaid. The defendant had a right to appeal the first judgment but chose to approve it. Approval of a judgment is also approval of all recitals contained therein. The proceedings below may have been rather informal, but we believe that they properly effectuate the intent of the court and the parties in modifying the first judgment. See *Zimmerman v. Bankers Life and Casualty Co.*, 324 Ill. App. 370. The



Circuit Court had jurisdiction of the subject matter here. See Knaus v. Chicago Title & Trust Co., 365 Ill. 588.

For the reasons above, the judgment of the Circuit Court is affirmed.

AFFIRMED.

KILEY, P. J. AND MURPHY, J. CONCUR

ABSTRACT ONLY



FILED OCT. 17, 1960

Gen. No. 11296

Agenda 1

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, SECOND DIVISION
MAY TERM, A. D. 1960

PATRICIA ANN SAYAD,
Plaintiff-Appellee,
Respondent,

-vs-

JOHN SAYAD,
Defendant-Appellant,
Petitioner.

Appeal from the

Circuit Court of

Mercer County.

27 I.A. 250

PER CURIAM:

This is an appeal by John Sayad, the defendant-appellant husband, from an order of the Circuit Court of Mercer County allowing the plaintiff's motion to strike the defendant's motion to vacate a decree of divorce and denying the defendant's motion to vacate a decree granting a divorce to Patricia A. Sayad, the plaintiff-appellee wife, on the grounds of extreme and repeated cruelty, awarding custody of two minor children, John, age 3, and Kathy, age 2, to the plaintiff mother, with the right in the defendant to visit the children at reasonable times, ordering \$10.00 per week per child be paid by the defendant father for the support of the minor children, and ordering the defendant to pay \$250.00 plaintiff's attorney fees within 90 days of the entry of the decree. The decree contained findings as to jurisdiction, the plaintiff's residence, the parties' marriage, the minor children and that



they had been and were in her custody, that the plaintiff had conducted herself as a dutiful and affectionate wife, as to the defendant's extreme and repeated cruelty, that the plaintiff was a suitable person to have custody of the children, and she was entitled to an allowance for child support and her attorney's fees.

The defendant contends that (1) the acts testified to do not amount to extreme cruelty; (2) on defendant's denial under oath in his answer and testimony, the plaintiff's evidence alone is insufficient to support the decree; (3) there can be no lawful order for child support where there is neither allegation nor proof of the plaintiff's need and the defendant's ability to pay; (4) there can be no lawful order for plaintiff's attorney's fees where there is neither allegation nor proof of the plaintiff's need and the defendant's ability to pay; (5) where the wife without legal reason refuses to live with her husband and leaves, taking the minor children with her, she assumes the duty of supporting herself and the children and defraying her own litigation costs; and (6) the plaintiff did not file her suit in good faith and the Court should not have granted the decree.

The plaintiff urges that the defendant was guilty of extreme and repeated cruelty, the testimony was sufficient to allow the finding, the award of child support and the allowance of plaintiff's attorney's fees was proper, and the findings are not against the manifest weight of the evidence.

The cause was heard on the complaint and answer before the Court without a jury and there were but two wit-

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nesses, the plaintiff and the defendant. The complaint alleged the plaintiff's residence, the marriage, the children and that they had at all times been and then were in her custody, that she had conducted herself properly, the claimed acts of extreme and repeated cruelty, and the defendant had not contributed to the support of the children since the plaintiff left the marital home. The answer admitted the allegations as to the plaintiff's residence, the marriage, the children, though denying the plaintiff is a fit and proper person to have custody, and denied the remaining allegations.

The plaintiff wife testified substantially as follows, so far as now material: On June 28, 1953 she was married to John Sayad. On May 20, 1957 she left her husband, taking the two children, because he was mean to her; she did not tell him then that she was leaving, but she was afraid of him and afraid to come back. They were not then living together as husband and wife and had not been for some time; the defendant slept in an upstairs apartment of his mother's building while the plaintiff and the children were in a downstairs apartment in the same building, though the defendant had meals with the plaintiff and the children. He was always accusing her of putting too much salt in the food and making him sick. She said after she left he phoned her and after she had filed this suit he called her four or five times a night, would swear at her and her folks and say all sorts of things over the telephone. She further testified that on March 14, 1957, after accusing her of putting too much salt in his food and causing him to be sick, he struck her, hit her on the face with his fist, causing her to have a black and

blue mark, a bruise, on the face. On April 10, 1957 he cursed her, called her names, accused her of making him sick, causing the daughter's eczema, and causing the son to have a birthmark as a result of putting too much salt in his food, and he started hitting her with his fist on her head and back. In an argument on May 20, 1957 about the same things he again struck her with both fists on the head and face. She testified that she and the children ate the same food as the defendant without any harmful results, that she did nothing to provoke the acts of alleged cruelty committed upon her by her husband, and that during all of the times she alluded to she was always kind to him and gave him no cause for the arguments or for striking her. The children are in good health. The son's tooth has been extracted. The doctor is treating the daughter's eczema and said it was something she'd have to outgrow. Since she left the defendant he has not paid anything toward the support of the children or her attorney's fees. About a year or so after the marriage the defendant's health got bad, he had trouble walking, he developed a limp, and he still limps. She is not now working. She formerly worked, starting after the children were born. The defendant's mother, she said, was old and feeble, and there would be no one to care for the children if the defendant had them at his home.

The defendant in his testimony, in substance, denied all of the particular alleged acts of cruelty. He testified that he never struck his wife at any time, and that on March 14, 1957 while the plaintiff was brutally beating their son he came between her and the son and restrained her from continuing but

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that the force he then used did not injure her at all, that he merely "held her or dragged her" away from the boy, but did not hit her. He said his mother was present at that time. He further testified that he was healthy before his marriage, but because of the salt the plaintiff used in seasoning the food he is now very weak and not healthy, that it caused the son's tooth to become black, and it also caused his wife, the plaintiff, to have psoriasis, which he described as a skin disease, and that the nerve in the boy's tooth had died as a result of the salt. He testified that he was examined at Wesley Memorial Hospital where his condition was described as multiple sclerosis. Or it may be nerves. He says he is better now than in 1954, though he has trouble walking, and has been lame. He said he did not want his wife to have custody of the children because there was disease in her family, in that her brother had had polio and that her mother had an eye disease, trichoma, that a temperature of 80° (evidently in the home) was a poor condition for the children to exist under, and further, that the children had no "heritage" living with the mother. He admitted, however, that the wife took pretty good care of the children, and said he would resume living with her and the children even if she did the cooking. He said he had given her \$50.00 to come home on, but had not been able to give her or the children any further funds. He says his mother's physical condition is good. He loves his children and wants them.

The Court in its decree made a finding as follows:

"6. That since their marriage, defendant has been guilty of extreme and repeated cruelty toward the plaintiff and more specifically, on or about the 14th day of March, 1957, the defendant, without any cause, struck the plaintiff a violent blow on her head with

his fist at their home in Chicago, Illinois, and again, on or about the 10th day of April, 1957, at their home in the City of Chicago, Illinois, the defendant violently and without cause hit plaintiff about the face and back with his fist, greatly injuring her, and again, at their home in Chicago, Illinois, on or about the 20th day of May, 1957, the defendant again struck the plaintiff about the face and on the back greatly injuring her. After such last act of cruelty, plaintiff left the home of the defendant and has refused to live with him since that time, all as set forth in the Complaint filed herein."

The trial court had the opportunity, which we do not, of observing the conduct and demeanor of the witnesses while testifying, and from that and their testimony it had the duty to determine the credibility of the witnesses and the weight of their testimony and whether or not, upon weighing the evidence, the proof showed by a preponderance of the evidence that the defendant was guilty of extreme and repeated cruelty, as charged, the burden of proof being, of course, on the plaintiff. The degree of proof required in a divorce case, as in any civil case, however, is no more than a preponderance of the evidence: BAKER v. BAKER (1955) 6 Ill. App. (2) 557; LENNING v. LENNING (1898) 176 Ill. 180. The practice and proceedings under the Divorce Act are the same as in other civil cases except as otherwise provided by the act or by any law or rule of Court: CH. 40 ILL. REV. STATS., 1959, PAR. 7. The mental and physical condition of the parties and their temperaments as indicated in the evidence and by their conduct and demeanor while testifying must be and presumably were considered by the Court in connection with the charges. The particular conditions and circumstances surrounding the alleged acts of cruelty at the time of the alleged commission thereof were matters to be considered in determining the credibility of the testimony of the plaintiff and the defendant.

The trial court here apparently believed, and reasonably could believe, the testimony of the plaintiff rather than the defendant as to the material facts bearing on the alleged grounds, and considered that the acts so established constituted extreme and repeated cruelty. The statutory grounds is simply "extreme and repeated cruelty": CH. 40 ILL. REV. STATS., 1959, PAR. 1. Each case must be considered on its own facts, - evidence of a hit on the chin in the course of an argument, striking on the side of the head with a fishing tackle box, kicking, and striking with a fist or various objects has been held to be ample evidence from which a jury could conclude the defendant was guilty of extreme and repeated cruelty: SURRATT v. SURRATT (1957) 12 Ill. (2) 21. Extreme and repeated cruelty must be grave and endanger life or limb or subject the person to danger of great bodily harm, - slight acts of violence are not extreme cruelty: BALFOUR v. BALFOUR (1959) 20 Ill. App. (2) 590. It has been held that the evidence justified granting a husband a divorce for cruelty where the wife attacked him physically without provocation on three occasions, striking and kicking him, resulting in his legs being bruised, marked, and sore: FRYMAN v. FRYMAN (1955) 5 Ill. App. (2) 479. Extreme cruelty has been often construed, and means acts of physical violence producing bodily harm: TEAL v. TEAL (1927) 324 Ill. 207. And see WARD v. WARD (1882) 103 Ill. 477.

There is no rule in a divorce case such as this, where the complaint is not taken as confessed and where it is not a case of default, absolutely requiring corroboration in all instances of the testimony of the plaintiff alone as to the facts claimed to be grounds if the plaintiff's testimony alone is sufficiently

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credible in the light of opposing evidence to warrant acceptance by reasonable persons: SURRATT v. SURRATT, supra. This, of course, is not at all to say that in all such cases the testimony of the plaintiff alone, uncorroborated, is sufficient. The evidence must always be weighed and its preponderance determined. The absence of corroborative testimony may be a proper circumstance to be considered in any case, and in a particular case the absence thereof, considered with the other material facts and circumstances, might warrant a trial court, in its weighing of the evidence and determining its preponderance, in not considering the plaintiff's testimony alone sufficiently credible to be accepted by reasonable persons: BALFOUR v. BALFOUR, supra. But there is no arbitrary rule in a divorce case such as this that the cause be heard by examination of "witnesses", or that the cause of divorce be proven by reliable "witnesses". The statute which in some instances does require "witnesses", CH. 40 ILL. REV. STATS., 1959, PAR. 9, applies only "if the complaint is taken as confessed" and in "case of default". Cf. SWEET v. SWEET (1934) 277 Ill. App. 545; WELLINGTON v. WELLINGTON (1907) 137 Ill. App. 394. That the plaintiff here did not call the defendant's mother as a possible witness, who may have been present at one of the incidents, hardly raises any implications unfavorable to the plaintiff. It may be a matter of some curiosity as to why the defendant did not call his own mother as a witness on his behalf. Representative of the cases cited by the defendant on this are: LORENZ v. LORENZ (1879) 93 Ill. 376, JENKINS v. JENKINS (1877) 86 Ill. 340, and WHITLOCK v. WHITLOCK (1915) 268 Ill. 218. None are at all variant from our views, and, moreover, LORENZ v. LORENZ was a case where the bill

was taken as confessed and was a case of default, which, as we've seen, involves different considerations.

We see no reversible error in the Court's finding that the defendant was guilty of extreme and repeated cruelty, as testified to by the plaintiff, and hence that there was a grounds for divorce. We cannot say such is contrary to the manifest weight of the evidence. We would not be justified in reversing a determination which, as here, is so dependent on the weight and credence to be given the testimony of witnesses: SURRATT v. SURRATT, supra. That finding is supported by evidence and under the circumstances we will not disturb a finding of facts thus made: BALFOUR v. BALFOUR, supra. The question of preponderance of the evidence was here largely a question of credibility of the witnesses and was for the trier of the facts to determine: Cf. RYAN v. HARTY (1916) 200 Ill. App. 470; HAYDEN v. MILLER (1917) 205 Ill. App. 147.

Nor, under the circumstances, do we perceive any reversible error in that part of the decree awarding the custody of the two minor children to the plaintiff mother, with the right in the defendant to visit the children at reasonable times, considering the circumstances of the parties and the nature of the case and what would appear to be fit, reasonable and just as of the time of the decree, those being the statutory tests or standards or requirements as to the disposition of the care and custody of minor children when a divorce is decreed: CH. 40 ILL. REV. STATS., 1959, par. 19. No manifest injustice has been done and there was no abuse of the trial court's judicial discretion: BATEMAN v. BATEMAN (1949) 337 Ill. App. 7. We cannot say such is contrary

to the manifest weight of the evidence, and the defendant does not appear to seriously question that part of the decree.

But, as to those parts of the decree ordering the defendant to pay \$10.00 per week per child for the support of the children, and ordering the defendant to pay \$250.00 plaintiff's attorney's fees, the needs of the plaintiff and the children in those respects, the facts as to the claim for attorney's fees, the capacities of the plaintiff, and the ability of the defendant to make such payments must be either admitted or proved, this being essential both to his basic liability to make such payments and to the particular amount of the payments. As to the support of the children the order must be such "as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just." CH. 40 ILL. REV. STATS., 1959, PAR. 19. And as to any claimed allowance for the plaintiff's attorney's fees such must be such sum, if any, "as may enable her . . . to maintain . . . the suit," and the order with reference thereto must be such as seems "just and equitable": CH. 40 ILL. REV. STATS., 1959, PAR. 16. The defendant admitted nothing in those regards, and since the abstract here shows nothing in the way of evidence was offered on the issues of child support or plaintiff's attorney's fees, the Court, we believe, erred in setting any amount for child support and attorney's fees on the present record, - there was no evidence to substantiate the same. Under the circumstances, those parts of the decree are not, on the present record, in accord with the circumstances of the parties and the

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nature of the case, are not fit, reasonable, and just, and there is nothing to indicate the allowance of plaintiff's attorney's fees was necessary to enable her to maintain the suit or is just and equitable: CZARNECKI v. CZARNECKI (1930) 341 Ill. 629; KNOL v. KNOL (1912) 171 Ill. App. 412; COLEMAN v. COLEMAN (1950) 341 Ill. App. 462. And Cf. ARADO v. ARADO (1917) 281 Ill. 123; CARLIN v. CARLIN (1895) 65 Ill. App. 160; GOLSTEIN v. GOLSTEIN (1946) 328 Ill. App. 335; KLEINSCHMIDT v. KLEINSCHMIDT (1952) 345 Ill. App. 608.

Accordingly, the order is affirmed to the extent it declines to vacate the decree as to the granting of the divorce, and the awarding of custody of the children, and is reversed to the extent it declines to vacate the decree as to the allowance for child support and plaintiff's attorney's fees, and the cause is remanded with instructions to take evidence, if presented, on those issues and for further proceedings not inconsistent herewith.

AFFIRMED in part.

**REVERSED in part, and
REMANDED, with instructions.**

The logo of the Chicago Bar Association, featuring the text "CHICAGO BAR ASSOCIATION" in a circular arrangement around the word "JULY" in the center.

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Wernecke met his alleged accomplice, Stiegler, in January of 1959 at the Broadway Equipment Company, located in Chicago and owned by George Schank, a friend of Wernecke. Stiegler was separated from his wife, had no home, and was unemployed. He testified that Wernecke had befriended him, allowed him to live in his home, and gave him his meals there during most of the latter part of January.

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Wernecke and Nicholas had known each other for many years and were at one time associated in the real estate business. Subsequently Wernecke developed an antipathy toward ~~the~~ Nicholas because of a trip that Wernecke's wife had taken out of the State with Nicholas and a robbery for which Wernecke held Nicholas responsible. About February first, Stiegler testified, Wernecke confided to him that he wanted "to get even with" Nicholas and a few days later inquired of Stiegler whether he knew of anyone who could do bodily harm to Nicholas, adding that it would be worth \$1500.00 to him "to have someone do away with Mr. Nicholas." The next day Wernecke, while driving Stiegler to his home, pointed out to him Nicholas' house and store, as well as his car, and said that it would be hard to get Nicholas alone since "he always had somebody with him." Stiegler testified that he attempted to dissuade Wernecke from carrying out his design against Nicholas, but that a few days later he assured Werenecke he would try to find somebody to do away with Nicholas. On cross-examination Wernecke's counsel inquired of the witness: "He [Wernecke] never asked you to commit the crime, did he?" Stiegler replied: "He asked me in these words. Would I, or did I know someone that would." There was never a third party present at the conversations to which Stiegler testified.

Helen Babian, testifying for Wernecke, said that she had known him for eight years, and had worked for him in his real estate brokerage business. On February twelfth, she stated,

Wernecke and Stiegler came to her apartment. Wernecke was very upset and told her that his gun was missing. Inasmuch as Stiegler was living with Wernecke, she surmised that Stiegler had taken it, and she advised him to return it. He denied that he had the gun; insisted, in fact, that he had never seen it. This conversation took place in the presence of Wernecke. Subsequently, Mrs. Babian testified, she had many conversations with Stiegler, in the course of which he told her that he wanted some money from Wernecke so that he could have his car repaired and go to Texas. Wernecke refused to give Stiegler any money for this purpose, and Stiegler said that he could get some money from Nicholas but did not want to "stab Bill [Wernecke] in the back." She urged Stiegler not to do anything which he would regret later, and, since he was out of work and without a home, she gave him a small amount of money, had him over to a good many meals, and gave him the key to her house. The gist of Mrs. Babian's testimony is that Stiegler hoped to get money from Wernecke through a threat to blackmail him, and that with the failure of that plan he next attempted to obtain money from Nicholas. He was undoubtedly desperate for money, but there is no testimony to support the conclusion that he agreed to kill Nicholas, nor any testimony that he tried to find somebody else to do so.

Albert Ferris, testifying on behalf of Wernecke, said that he had known him for ten months. About January fifteenth Ferris and Stiegler had supper in Schank's apartment--during

the first half of January both Ferris and Stiegler were living in Schank's apartment building. During supper Stiegler asked Ferris if he knew whether Wernecke had "a lot of money." Ferris replied that he was not familiar with Wernecke's financial status; Stiegler asserted that he had learned that Wernecke did have "a lot of money" and added that the next day he was "going to shake him down for \$5000.00 and if Mr. Wernecke fails to pay me \$5000.00, I am going to take one of his guns and either kill him or frame him with it."

Wernecke testified on his own behalf that he had met Stiegler about January 1, 1959 at the Broadway Equipment Company, and that Stiegler was unemployed and did some odd jobs for Wernecke from time to time. He denied asking Stiegler if he knew anyone who could do bodily harm to Nicholas or damage to his car, denied that he had told Stiegler that it would be worth \$1500.00 to him to have someone do away with Nicholas, denied that he pointed out to Stiegler Nicholas' home and car or told Stiegler that it would be difficult to find Nicholas alone because he always had someone with him. He also denied telling Stiegler that he had been in court as a prosecuting witness against Nicholas, that he had discussed a desire to have Nicholas done away with, or that he had offered Stiegler or anyone else money to do Nicholas harm. He characterized Nicholas as "an itinerant immigrant who came here and abused our country by six convictions for 'con game.'" Wernecke admitted having conversations with Stiegler but only as the employer of an odd-job man.

Dadishou Nicholas testified that he knew Wernecke. He stated that he had occasion to see him in the Criminal Court Building on August 27, 1958, that while he was talking to Alderman Freeman on the fourth floor outside Judge Daly's courtroom, Wernecke asked Freeman whether he was Nicholas' lawyer, to which Freeman responded in the negative, and that Wernecke then struck Nicholas in the nose. He said that Wernecke accused him of taking his wife away and threatened that he was "going to get" him. He further testified that on October 9, 1958, after the judgment against Nicholas was dismissed in the Felony Court, Wernecke came out and said: "You get away with this, but you are not going to get up with bullet, I have you killed." Nicholas stated that he and Wernecke had been "very friendly" for ten years, but that during the past several years their relationship was strained.

The statutory crime for which Wernecke was found guilty is classified as a misdemeanor and is governed by the Conspiracy Statute (Ill. Rev. Stat. 1959, ch. 38, par 139, sec. 46). The gist of a conspiracy is an agreement to do an unlawful act or to do a lawful act in an unlawful manner. Stiegler, the alleged co-conspirator, who turned State's witness, testified that after the alleged conversations hereinbefore related with Wernecke he went to Nicholas' home to warn him. This statement lends support to Wernecke's contention that when Stiegler failed to obtain money from him he resolved to try his luck with Nicholas. If, as Stiegler testified, Wernecke asked him if he

knew anyone who would do bodily harm to Nicholas, there is still no testimony that Stiegler, either directly or indirectly, agreed with Wernecke to find someone to murder Nicholas or agreed to commit the murder himself. The most that can be said of Stiegler's testimony is that he had conversations with Wernecke; there is no persuasive testimony to support the conclusion that an agreement was reached. When Stiegler went to Nicholas' home and told him of the danger to which he was exposed, Nicholas' wife called the police. Stiegler had a gun on his person at the time and never anticipated that he would be arrested then. It is a reasonable inference that when Stiegler found himself under arrest he sought to extricate himself from his predicament by shifting the burden to Wernecke on the basis of Wernecke's obvious animosity toward Nicholas. All the conversations alleged to have been had between Wernecke and Stiegler are uncorroborated; the two men were alone. It was incumbent upon the State to prove the existence of a conspiracy beyond a reasonable doubt, and after a review of the record we have concluded that sufficient proof was not made. In *People v. Hodson*, 406 Ill. 328, the court said (p. 340) that in order "to justify the conclusion that a conspiracy existed, there must be evidence of some agreement or some joint action toward accomplishing the object of the conspiracy," citing *People v. Holtz*, 294 Ill. 143. In *People v. Braun*, 375 Ill. 284, the court stated (p. 286) that "the gist of the crime of conspiracy is the unlawful agreement to accomplish an unlawful

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purpose or an agreement to perform a lawful act in an unlawful way," citing Williamson v. United States, 207 U.S. 425, and People v. Drury, 335 Ill. 539. The record in this proceeding fails to show any agreement constituting a conspiracy.

For the reasons indicated, the judgment of the Criminal Court is reversed.

JUDGMENT REVERSED.

BURKE, P. J., and BRYANT, J., CONCUR.

ABST.



47933

MILIVOJE MITROVICH,

Plaintiff-Appellee,

v.

JOLE LIPOVIC, a/k/a GEORGE A.
LIPOVICH, MILES RADOVIC, ROY
PAVICH and ZIVKO JOVIC,

Defendants,

JOLE LIPOVIC,

Defendant-Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

27 1A^{2d} 302

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In an action for damages arising out of an alleged assault and battery the return of the Sheriff certified that the summons was served personally on one of the four defendants on January 7, 1957. An order of default was entered against him on May 16, 1958. On June 20, 1958, following a verdict, judgment was entered for \$4,000. On October 17, 1958, the defendant filed his verified petition praying that the judgment be vacated, that he be given leave to answer and for other relief. The petition stated that he was not served with the summons, that the Sheriff's return was false, asserted ultimate facts showing a defense to the action, and that he acted with diligence after learning of the judgment.

The court denied plaintiff's oral motion to strike the petition, and suggested that plaintiff file a denial of the allegations he did not choose to admit. Plaintiff's attorney

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stated that he would file a denial. None was filed. The defendant testified that he was not served with a summons. The deputy who certified the return testified that he had no recollection of serving the summons and that he relied upon the record. On July 8, 1959, on motion of plaintiff, the three defendants not served were dismissed, and on the same day the court vacated the judgment of June 20, 1958, denied leave to defendant to answer the amended complaint and entered judgment upon the verdict. Defendant appeals.

Under the provisions of Par. 2 of Sec. 50 of the Civil Practice Act the judgment of June 20, 1958, adjudicated the rights and liabilities of fewer than all the parties, did not terminate the action and was subject to revision at the time of the entry of the judgment of July 8, 1959. The court had a broad discretion to grant the relief sought by the defendant. Under the circumstances presented we are of the opinion that the court erred in denying defendant his day in court and in entering judgment. Therefore the judgment of July 8, 1959, is vacated, and the cause is remanded with directions to allow defendant to answer and for further proceedings.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND AND BRYANT, JJ., CONCUR.

STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at
Springfield, on the FIRST TUESDAY in _____ OCTOBER _____ A. D. 19 60

PRESENT

HONORABLE WILLIAM M. CARROLL, Presiding Justice

HONORABLE C. ROSS REYNOLDS, Justice

HONORABLE BURTON A. ROETH, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 20th day of
OCTOBER, A. D. 19 60, there was filed in the office of the said Clerk of said Court,
an opinion of said Court, in words and figures following:

of its ordinance.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10284

Agenda No. 2

Patricia Neumeyer and James Sterling,

Plaintiffs-Appellants,

vs.

Loren Cunningham,

Defendant-Appellee.

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Appeal from the
Circuit Court of
DeWitt County

CARROLL, Presiding Justice.

Patricia Neumeyer sued to recover damages for personal injuries sustained in a collision between an automobile owned by James Sterling and which she was driving and an automobile owned and operated by the defendant, Loren Cunningham. The claim of plaintiff Sterling was for property damages resulting from the collision. The defendant filed a counterclaim against both plaintiffs for property damage to his automobile. A jury found the defendant and both counter-defendants not guilty. Plaintiffs' post-trial motion for judgment notwithstanding the verdict or in the alternative for a new trial was denied and judgment entered on the verdict.

Plaintiffs have appealed and contend that the verdict was manifestly against the weight of the evidence; that the jury were not accurately instructed and for such reasons the trial court should have awarded plaintiffs a new trial.

The record shows that on December 15, 1957, at about 8:45 A.M., plaintiffs were en route to church services at DeWitt, Illinois, where James Sterling was a student minister. Patricia Neumeyer was driving a Chevrolet automobile owned by Sterling who was seated beside her. The weather was foggy and the road wet. The collision occurred on a curve in a blacktop road known as Birbeck Road. The Sterling car was proceeding South and defendant, who was returning to his home from Clinton, Illinois, was going in the opposite direction.

Patricia Neumeyer testified that she was driving about 30 or 35 miles per hour as she entered the curve; that her dim lights were on; that when she first observed defendant's car it was 60 to 100 feet from her and was entering her lane of traffic; that she could not estimate its speed; that she swerved into defendant's traffic lane to avoid a collision and applied her brakes; that her back wheels skidded to the left and she ran into the North bound traffic lane; that as defendant's car approached, its lights were not on; that defendant then pulled back into his lane of traffic and then both cars were in defendant's lane; that immediately after the two cars entered defendant's lane the impact occurred; that she was familiar with the road and had been driving over it for 5 or 6 months prior to the accident; that she had a conversation with defendant after the accident in which the latter said that the only thing he knew was to get back on his own side of the road.

James Sterling testified that as his car approached the curve the weather was foggy and the road was slick and slippery;

that he was then reviewing his sermon which was to be delivered at his church in DeWitt and was glancing at it from time to time; that as he looked up he saw defendant's car approximately 60 to 70 feet away entering the curve on the inside or in plaintiffs' traffic lane; that he yelled to the driver; that she tried to apply her brakes and he felt the car swerving to its left; that it left plaintiffs' lane and entered defendant's lane where the collision occurred; and that he recalled conversation with defendant after collision in which the latter said all he could do was to get back on his own side of the road.

The defendant testified that he approached the curve where the accident occurred at approximately 40 to 45 miles per hour; that he entered the curve on his own side of the road and at all times remained in his own traffic lane; that he could see the Sterling car when it was about 100 yards from him and before it had entered the curve; that he started slowing down; that the Sterling car came into his traffic lane and remained there; that the two cars collided head-on in the southerly or defendant's traffic lane; that his speed had been reduced to 15 miles per hour; that after the collision both cars were in defendant's lane; that they were about 2 or 3 feet apart and facing in opposite directions. Defendant denied that he told plaintiffs after the accident that the only thing he knew was to get back in his own lane of traffic.

Harold Boyer, State Trooper, testified he was called to the accident scene; that the cars were facing each other on the South part of the curve; that he saw a skid mark which began one



foot to the right of the center line of the road and which extended into the left lane; that he talked to plaintiffs concerning the accident; that Sterling said he had not been looking; that Patricia Neumeyer said she had not seen the other car and she hadn't seen it quick enough to avoid hitting it; that he talked to the defendant who stated that he saw the Sterling car but had been afraid to turn either way as he feared it would follow him.

James L. Smith, a State Trooper, testified he went to the accident scene with Officer Boyer; that the two cars were in a southerly direction from the center line of the blacktop road and were West of the curve which curves in an easterly and northerly direction; that he observed skid marks which began in the North lane; that he was present when Officer Boyer talked with Sterling; and that the latter stated that he didn't know what happened and did not observe what was going on.

From the foregoing resume of the testimony of the occurrence witnesses and the State Troopers, it is apparent that there was substantial conflict in the evidence on the issues of defendant's negligence and of plaintiffs' due care. In this situation, it was for the jury to weigh the evidence and determine the credibility of conflicting testimony and such function may not be usurped by a reviewing court. City of Monticello v. LeCrone, 414 Ill. 550; DeLegge v. Karlsen, 17 Ill. App. 2d, 69.

A verdict based upon conflicting evidence will not be disturbed on appeal unless contrary to the manifest weight of the evidence. Spiker v. Christenson, d/b/a Ham and Merv Taxi Co. 12 Ill. App. 2d, 557. Where the evidence is conflicting, in order for a verdict to be contrary to the manifest weight of the evidence

an opposite conclusion must be clearly evident. Stone v. Guthrie, 14 Ill. App. 2d, 137; DeLong v. Whitehead, 11^{Ill.} App. 2d, 330; DeLogge v. Karlsen, supra. From our examination of the record we are convinced that a conclusion opposite to that reached by the jury cannot be said to be clearly apparent.

While the jury might have accepted plaintiff's version of the occurrence, nevertheless such a possibility does not permit this court to reweigh the evidence and set aside the verdict. This rule is so well established as to require no citation of authority.

The instructions of which plaintiffs complain are not set out in their brief but are merely referred to therein as defendant's Instructions Nos. 2, 12, 13, 16, 18, 23 and 24. It is the rule that instructions to which objection is made or upon which error is assigned should be set out in the brief of the party complaining of the same. Beebe v. Workman, 336 Ill. App. 1; Romines v. Illinois Motor Freight, Inc., 21 Ill. App. 2d, 380; Millikin Nat. Bank v. Shellabarger Grain Co., 326 Ill. App. 72. The reviewing court is not required to search the record or abstract to find such instructions.

Although we think plaintiffs are not entitled to have the claimed instruction errors reviewed we nevertheless have examined the same and are satisfied that the court did not err in instructing the jury.

An additional point raised by plaintiffs is that the trial court erred in voicing its opinion on a material controverted fact. The alleged error was not mentioned in the post-

trial motion and accordingly was not called to the trial court's attention. A question not raised in the trial court cannot for the first time be raised on appeal unless such question goes to the jurisdiction. Sunga v. Lee, 13 Ill. App. 2d, 76. The issue raised by plaintiffs does not involve jurisdiction and may not be considered by this Court.

Since we are of the opinion that the record reflects no reversible error the judgment will be affirmed.

Affirmed.

REYNOLDS and ROETH, JJ., concur.



STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at
Springfield, on the FIRST TUESDAY in OCTOBER A. D. 19⁶⁰

PRESENT

271.A.312²¹

HONORABLE WILLIAM M. CARROLL, Presiding Justice

HONORABLE C. ROSS REYNOLDS, Justice

HONORABLE BURTON A. ROETH, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 20th day of

OCTOBER, A. D. 19⁶⁰, there was filed in the office of the said Clerk of said Court,

an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

FILED

Robert L. Conn
J. 11 15 1911

General No. 10297

Agenda No. 3

Elsie E. Stephenson,

Plaintiff-Appellant,

vs.

William Webb and General Telephone
Directory Company, a Corporation,

Defendants-Appellees.

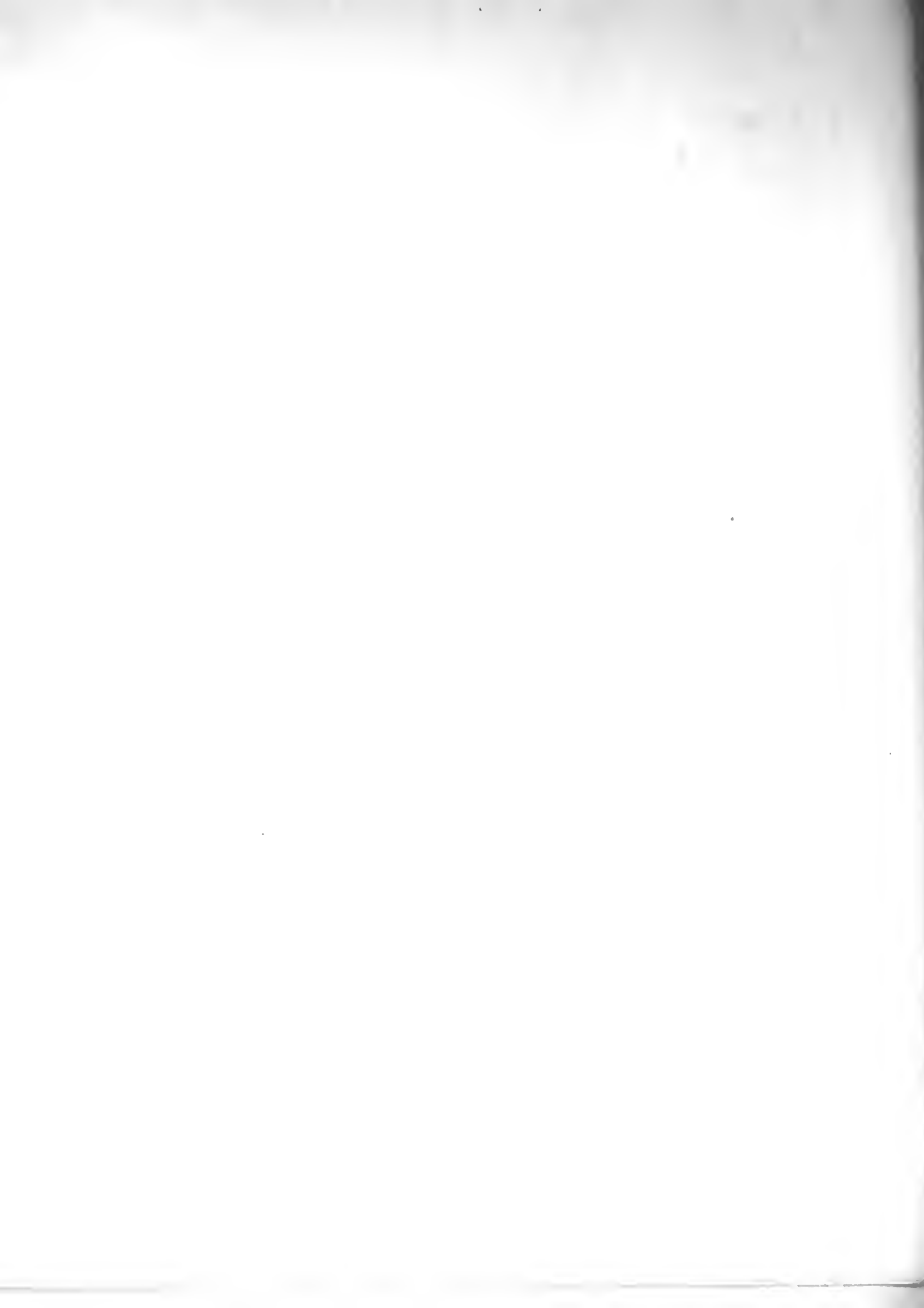
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Appeal from the
Circuit Court of
McLean County

Carroll, Presiding Justice.

Plaintiff brought this action to recover damages for personal injuries sustained as the result of a collision between the automobile in which she was riding as a passenger and an automobile owned by defendant General Telephone Directory Company and driven by the defendant William Webb. A jury found the defendants not guilty. Plaintiff's post-trial motion for a new trial was denied and judgment for defendants entered on the verdict.

The grounds urged for reversal of the judgment are that the verdict is contrary to the manifest weight of the evidence and that the jury were given certain erroneous instructions.



The collision occurred at the intersection of Madison and Market Streets in Bloomington, Illinois. Madison Street runs north and south intersecting Market Street on a downgrade. Traffic on Madison Street at the intersection is given preference over that on Market Street by a stop sign. Plaintiff was riding as a passenger in a car which her daughter-in-law, Betty Jean Stephenson, was driving north on Madison Street. Defendant Webb, driving a car owned by General Telephone Directory Company, was proceeding west on Market Street. The two vehicles collided in the southeast quadrant of the intersection.

Betty Jean Stephenson testified she was driving a Chevrolet automobile owned by her husband; that the pavement was damp due to misting rain; that plaintiff was seated next to her in the front seat; that she drove down Madison Street and when she reached the Market Street intersection she stopped momentarily at the stop sign which was 10 to 15 feet south of the south curb line of Market Street; that she stopped even with the stop sign; that she then looked to the right but did not look to the left because her vision in that direction at that point was obstructed by an apartment building which was even with the sidewalk on the east side of Madison Street; that she could see a quarter of a block to her right but saw no traffic coming; that she then pulled forward to where her front wheels were even with the curb line and stopped; that she then looked to the left and to the right; that she saw no moving traffic on Market Street; that

looking to her right she could see all the way to the intersection of Market and Center Streets, a distance which she estimated to be 200 to 250 feet; that continuing to watch to the right she pulled out into the road; that she had crossed the imaginary middle line of Market Street when she first saw defendant's car approaching from the east at a fast rate of speed; that she tried to accelerate but did not know how much her speed increased; that defendant's car was travelling at 50 miles per hour; that it did not slow down or change direction prior to the accident; that she saw defendant coming and tried to move; that defendant's car came straight and struck her car on its right rear fender; that her car travelled approximately a car's length from the time she first saw defendant's car to the east until the collision; that she was travelling about 5 miles per hour; that when the cars collided her car swung around and stopped facing south about 15 feet north of the intersection; that defendant's car came to a stop about 140 feet down the street and that defendant got out and ran somewhere.

Plaintiff testified that she did not drive automobiles and was riding as a guest with Betty Jean Stephenson; that she observed the latter's driving; that Betty stopped her car at the Market Street stop sign; that they both looked to the left and right but their vision was obstructed; that they proceeded further to where the car was even with the curb and again stopped and looked; that there was no traffic coming either way; that they then proceeded to cross the intersection; that when they got into the



west bound lane of traffic she looked to the side and said "ooh"; that she then could see defendant's car coming which was then 160 to 170 feet from the intersection; and that defendant's car was travelling fast and did not change its course.

The defendant testified that on the day of the accident he had been working in his office located 4 or 5 blocks east of the intersection in question and was on his way home at the time of the accident; that it was raining; that he was driving westerly on Market Street; that he stopped for the stop sign at the intersection of Center and Market Streets; that he then proceeded westerly; that he recalls seeing no other traffic in the street; that his speed never exceeded 20 miles per hour; that he did not recall whether or not his lights were on; that he first saw plaintiff's car almost at the point of the intersection of the two streets; that vision at this intersection was obstructed by trees, parked cars and an apartment house; that when he was approximately 10 feet from the intersection he first saw plaintiff's car proceeding directly into the intersection at approximately 20 miles per hour; that his car and that of plaintiff were in the intersection at approximately the same time; that he applied his brakes and swerved to the left to avoid a collision; that the impact occurred in the southeast section of the intersection; that his car stopped within a foot or so of the point of impact; that the plaintiff's car spun or turned in the opposite direction and stopped facing south at a point north of the intersection; that he got out of his car immediately and went up the street to call an ambulance and the police.

Where, as in this case, the evidence is conflicting, it is for the jury to judge the credibility of the witnesses and determine the weight to be given their testimony. Its findings on disputed fact questions will not be disturbed by a reviewing court unless it can be said that such findings are clearly and palpably against and contrary to the manifest weight of the evidence. The foregoing rule is so firmly established and has been laid down by our courts so often that it seems scarcely necessary to cite authority therefor. Leahy v. Morris, 289 Ill. App. 99. Plaintiff apparently concedes that there was conflicting evidence on the material issues in the case as her brief contains the statement that the "testimony elicited from the occupants of the two vehicles presented a sharp clash over the facts." Our attention is then directed to the testimony of plaintiff and her host driver that when they first saw defendant's car it was travelling at a high rate of speed while the defendant fixed the speed of both cars at 20 miles per hour. Such testimony in the record only tends to emphasize the necessity of applying in this case the rule which requires that determination as to disputed questions of fact be left to the jury. The mere fact that there is some contradiction in the evidence would not justify this court in substituting its judgment for that of the jury. Olin Industries, Inc. v. Wuellner, 1 Ill. App. 2d, 267. A verdict can be said to be against the manifest weight of the evidence only where an opposite conclusion is clearly evident. Schneiderman v. Interstate Transit Lines, 331 Ill. App. 143. The jury were not obliged to accept plaintiff's version of the facts and circumstances surrounding the occurrence. We think under the evidence

a jury might well have concluded that plaintiff had failed to furnish a reasonable explanation of the failure of both she and her driver to see defendant's car approaching from the right.

Upon careful examination of the record we find no basis for concluding that the verdict is against the manifest weight of the evidence.

Plaintiff complains of the court's rulings on certain instructions and insists her case was thereby prejudiced. None of the criticized instructions are set out in plaintiff's brief and the only reference thereto in the post trial motion is the following: "The court erred in giving the jury certain improper instructions on behalf of the defendant, namely, defendant's Instructions Numbers (3), (5), and (15)". At the conference on instructions, plaintiff objected to defendant's Instruction 15 on the ground that it is not a correct statement of the law and is not in the language of any statute. The instruction conference record discloses no objections to any other instructions. It has been held in numerous cases that a party will not be heard to complain of error in the instructions where such errors were not called to the trial court's attention by specific objections made either at the conference on instructions or in a post trial motion. Rubinstein v. Coleman, 22 Ill. App. 2d, 116; Arboit v. Gateway Trans. Co., 15 Ill. App. 2d, 500; Romines v. Illinois Motor Freight, Inc., 21 Ill. App. 2d, 380.

It is also the rule that instructions to which objection

is made or upon which error is assigned should be set out in the brief of the party complaining of the same. Beebe v. Workman, 336 Ill. App. 1; Millikin Nat. Bank v. Shellabarger Grain Co., 326 Ill. App. 72; Romines v. Illinois Motor Freight, Inc., supra.

We do not think plaintiff's objection to Instruction 15 was sufficiently specific to apprise the court of the defects rendering it erroneous and for the additional reason that the instructions complained of are not set out in plaintiff's brief we are of the opinion that none of the claimed errors were saved for review.

We find no reversible error in this record and the judgment of the trial court is affirmed.

Affirmed.

REYNOLDS and ROETH, JJ., concur.



STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at
Springfield, on the FIRST TUESDAY in _____ OCTOBER _____ A. D. 19⁶⁰

PRESENT

27 LA. 24 313

HONORABLE WILLIAM M. CARROLL, Presiding Justice

HONORABLE C. ROSS REYNOLDS, Justice

HONORABLE BURTON A. ROETH, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 20th day of
OCTOBER, A. D. 19⁶⁰, there was filed in the office of the said Clerk of said Court,
an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10303

Agenda No. 13

Sheldon Hill,)	
)	
Plaintiff-Appellee,)	
)	
vs.)	Appeal from the
)	Circuit Court of
K. T. Frost and C. W. Frank,)	Champaign County.
)	
Defendants-Appellants.)	

ROETH, Justice.

Plaintiff filed suit in the Circuit Court of Champaign County to recover an architect's fee for designing an office building. The complaint consisted of three counts. Count I alleged a verbal agreement with defendants under which he was to prepare preliminary sketches of the proposed building and if the same were accepted and he was directed to proceed with working drawings, he was to receive a fee of 4% of the total construction cost. Count 2 was a quantum meruit count. Count 3 is much the same as Count 1 except that it alleges that defendants agreed to use all reasonable means to build the building. Count 3 then alleges a breach of the contract in that defendants did not use all reasonable means to construct the building. Defendants filed their

answer denying the contract as alleged by plaintiff and setting up affirmatively that the contract was entirely contingent upon construction of the building and that if, "for any reason whatsoever", the building was not constructed the plaintiff was to receive no fee and as the defendants further allege it, "no building-no pay". Thus the sole issue as made by the pleadings, was whether the verbal contract was as alleged by plaintiff or whether it was entirely contingent upon the decision of defendants to actually construct the building. The cause was tried by the court without a jury and the trial judge found for the plaintiff and entered judgment for \$5,000.00. Basically the only question before us is whether or not the findings are against the manifest weight of the evidence.

From plaintiff's evidence the following appears: Plaintiff has been a licensed architect in Illinois since September 10, 1952, and started in private practice for himself in January of 1954. The initial person to person conference with the defendants took place in the late fall of 1954 in Champaign, Illinois, when the defendants met him and asked if he would be interested in designing plans for a medical office building at some future time. He had been a fraternity brother of defendant Frank and defendant Frost was the father-in-law of Frank. He signified



his interest and some two months later he received a phone call from defendant Frank who told him the project was somewhat more in mind and requested him to come to Bloomington to look over the proposed site. Plaintiff journeyed to Bloomington and met with the defendants, examined the site and was told that they, the defendants, were considering a speculative office building for doctors and that they needed graphic representations to demonstrate their intentions to prospective doctor tenants and to make financial arrangements. Nothing was said about any dollar budget. The same evening they had dinner at the Frank home with the wives of both defendants. The actual proposal on fee arrangements was made at this meeting in Bloomington in defendant Frank's home. Mr. Frank asked if the plaintiff would be interested in doing some preliminary studies to enable the defendants to gain interested tenants and financial information on a contingent basis, such that if the work were to go ahead then the fee would be applied as normal. The contingent fee arrangement was for the preliminary stage only, and if the defendants directed him to proceed with the working drawings and specifications, the fee was to be 4% of the cost, excluding supervision of the actual construction by him. The reason for excluding supervision was that plaintiff lived in Lake Forest and it would be impractical for him to do the supervising. Plaintiff testified that nothing was ever said by the defendants

to him in regard to a contingent fee arrangement on the entire project, and that he never agreed to a contingent fee arrangement on the entire project, but only on the preliminary study stage; that no maximum cost figure was given by the defendants to him.

In February, 1955, plaintiff met with defendants in Chicago and presented some preliminary sketches to them. He was instructed to meet with certain interested doctors, which he did on several occasions, for the purpose of conforming the layout of the building to the needs of the doctors. At one time or another the square foot cost of construction was discussed, with defendant Frank expressing a figure of \$10.00 per square foot as desirable and plaintiff suggesting that buildings of the type under consideration varied from \$12.00 to \$16.00 per square foot depending on locality. Upon seeing a Bloomington contractor, the contractor expressed his opinion that the building could be built for \$10.00 per square foot.

In the fall of 1955 his preliminary sketches or plans were approved by defendants and he was then instructed to prepare the final working drawings and specifications. Plaintiff prepared these working drawings and specifications and they were submitted to contractors for bids. The bids were opened in March, 1956, and the total of the low bids amounted to \$143,686.00. After the



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bids were opened and tabulated, defendants expressed disappointment over the total cost and for the first time advised plaintiff that they intended a building for a total cost of between \$125,000.00 and \$135,000.00. There was a discussion at this time as to rearrangements either by building deletions or revision of occupied space or attraction of other types of tenants. No request was ever made to plaintiff for revision of the plans. Plaintiff requested payment of his fee in April, 1956, after the bids had been opened, in the amount of 4% of the low bid. In May, 1956, he billed the defendants for \$5,000.00 subject to revision, upward or downward, on the basis of the eventual cost of construction. After bids were opened and tabulated defendants abandoned the idea of constructing the building and on May 26, 1956, defendants gave an option to purchase the land to one Bond, which was subsequently exercised for a selling price of \$33,500.00. Bond had been trying to buy the land from defendants since the summer of 1955. The defendants refused payment on the sole ground that their contract with plaintiff was entirely contingent upon the building being built and since they had decided not to build, they did not owe him anything.

Defendants do not dispute the fact that the work was done by plaintiff or that it was done in a good architectural manner or that the bids received for construction were within the normal

10503

range of such costs. There is, however, a sharp conflict in their testimony as to the terms of the verbal contract as compared with that of plaintiff. They testified that payment for the work done by plaintiff was on a contingent basis, i.e., contingent on the actual construction of the building as to which they, the defendants, were to be the sole judges. They testified that from the time of the first conference until the time when plaintiff was instructed to proceed with final plans and specifications, they repeatedly advised plaintiff "no building- no pay". And according to defendant Frost, at a meeting of the three parties in the fall of 1956 when defendants refused to pay plaintiff, the refusal to pay was on the basis that the contract was a contingent one of no building, no pay, and since they didn't build the building they didn't owe him anything.

We have not undertaken to detail all of the testimony, because much of it is unrelated to the basic question before the trial judge, namely, were the terms of the contract those as testified to by plaintiff or were the terms of the contract those as testified to by the defendants. Obviously this was a question of fact and one as to which the finding of the trial judge, who saw and heard the witnesses testify, is entitled to much consideration. 2 I.L.P. Appeal and Error, Sec. 786, and cases therein

cited. The question of the credibility of the witnesses becomes a very vital factor in such a case. In Kettlewell v. The Prudential Insurance Company of America, 4 Ill. 2d 383, 122 N.E. 2d 817, the court, in commenting upon the superior position of the trial judge, to judge the credibility of witnesses, said:

"The language in the opinion of the Missouri court in Creamer v. Bivert, 214 Mo. 473, 113 S.W. 1118, is strikingly appropriate. 'He (trial court) sees and hears much we cannot see and hear. We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.'"

Since the trial judge heard the testimony and observed the witnesses in open court, he was in a much better position to



determine their credibility than is a court of review and his findings in favor of the plaintiff, being supported by the evidence, should be upheld. Lang v. Parks, 19 Ill. 2d 223, 166 N.E. 2d 10. The findings of the trial judge find support in the record before us and we are not justified in disturbing them.

Counsel for defendants have filed a motion in this court pursuant to Rule 26, for leave to amend their answer to include the additional defense that plaintiff was instructed to design a building having a maximum construction cost of between \$90,000 and \$100,000, and that having failed to do so he cannot recover in any event. Counsel for plaintiff objects to the motion and we have taken it with the case. The defendants were each called as witnesses under Section 60 by the plaintiff. On the cross examination of defendant Frank he testified to remembering stating in his discovery deposition that he told plaintiff they had between \$125,000 and \$135,000 to spend. At another point he said that he and defendant Frost had about \$30,000 or \$35,00 to \$40,000 between them to put into the project. The defendant Frost testified on cross examination that they hoped to build the building for \$90,000 to \$100,000 but that he could not say definitely that plaintiff was so advised.

On examination of defendants in support of their case, over objection of plaintiff's counsel, defendant Frost said that he



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told plaintiff at one of their meetings that they had in mind a building of 9,000 square feet at \$10 per square foot and on another occasion that they had around \$135,000 to spend for everything. Defendant Frank says that it was mentioned that they could spend \$90,000 to \$100,000 on the building. Thus the defendants are at variance as to just what if anything was said about cost. A reading of the record in this case convinces us that the defense relied upon by defendants during the trial was that the contract was contingent upon actual construction of the building, and that if defendants decided, for any reason whatsoever, not to construct the building they would owe defendant nothing. The proposed defense of a cost limit is an afterthought. Aside from this it is highly questionable whether the foregoing evidence would be sufficient to prove the allegation which counsel for defendants propose to add to their answer, to-wit: "they instructed plaintiff that the building to be designed had to have a maximum construction cost of between \$90,000 and \$100,000". At no time in the trial court did counsel for defendant request leave to so amend their answer and this is understandable when it is considered that the only basis ever given plaintiff for refusal of defendants to pay plaintiff's bill was that their contract with him was entirely contingent upon the building being built. The motion to



amend will be denied.

Accordingly the judgment of the Circuit Court of Champaign County will be affirmed.

Affirmed.

Carroll, Presiding Justice, and Reynolds, Justice, concur.



ARST.



47985

CITY OF CHICAGO,

Plaintiff-Appellee,

v.

JACOB LEVY,

Defendant-Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

2d 386

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

Defendant was charged with having violated sections 87-400.3, 87-210-24, 87-100-1 and 86-14 of the Municipal Code of Chicago in that he failed to remove all exposed cord and wiring in the premises and halls and improper size of fuses in a building owned and operated by him at 1038 Altgeld Street, Chicago, Illinois.

Defendant said he was guilty of the charges. This statement cannot be contradicted by defendant's statement in his brief. City of Chicago v. Harrington, 263 Ill. App. 47, 50.

The city asked for the maximum penalty of \$200.00, however, the court, after ascertaining that the violations had been corrected before the day of trial, imposed a fine of \$100.00.

The defendant's main contention is that it was necessary to prove that he had knowledge of the violations or that the condition had existed long enough prior to the notice that he could have discovered the condition.

The main issue to be considered then is whether the city is required to prove knowledge of the violations on the part of the code violator before it can recover for the violation of its ordinance.

This was one of the issues which faced this court in the recent case of City of Chicago v. Hadesman, 17 Ill. App. (2d) 150. In that case, this court affirmed a judgment imposing a fine of \$2850.00 against a landlord who was found guilty of having committed 30 violations in a 43 flat building occupied by 100 tenants. The defendant there contended that the city was required to give notice as a prerequisite to instituting proceedings against him. This court, in rejecting that argument, said:

"An examination of the provisions of the Municipal Code of Chicago relative to fire and building regulations discloses that the provisions relative to the giving of notice merely afford a course of procedure for administrative officials in the enforcement of city building, fire and health regulations and were not intended to supplant the historic right of a municipality to sue for a penalty for violation of its ordinances. There is nothing in the Municipal Code of Chicago which would give defendant the right to violate provisions of the Code until notified; its provisions clearly make a violation subject to fine. If we were to accept defendant's theory it would serve to encourage noncompliance without fear of suffering penalties until notice of violation had been served." 17 Ill. App. (2d) 150, 156.

The rationale in that case is applicable to the case at bar.

There were four violations in a small number of apartments. At least one of those violations was of such a nature that it should have been apprehended by a cautious landlord. On the basis of these facts, the trial judge undoubtedly inferred that the landlord had knowledge or should have had knowledge of the violations.

The judgment is affirmed.

AFFIRMED.

BURKE, P. J., and FRIEND, J., CONCUR.

48041



PAUL KISZKAN,

Plaintiff,

v.

GREAT LAKES CARBON CORPORATION,
a corporation, and THE TEXAS
COMPANY, a corporation,
Defendants.

APPEAL FROM

SUPERIOR COURT,

GREAT LAKES CARBON CORPORATION,
Third-Party Plaintiff-Appellant,

COOK COUNTY.

v.

HAROLD BACON and FRANK A. STOLL,
doing business as BACON MANUFACTURING
COMPANY,
Third-Party Defendants-Appellees.

22-15802

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a Scaffold Act case. Indemnification is sought by Great Lakes Carbon Corporation, an original defendant and the third-party complainant, from contractors, who were hired to make repairs on premises in possession and control of Great Lakes. On motion, the trial court dismissed the third-party complaint, and Great Lakes appeals.

In substance, the third-party complaint and its exhibit, a copy of the principal-action complaint, shows that defendant, Great Lakes, contracted with the third-party defendants, Harold Bacon and Frank Stoll, for the installation or repair of a furnace and a smokestack located on premises owned or controlled by the co-defendants, Great Lakes and The Texas Company. On January 26, 1957, the plaintiff, Paul Kiszkan, an employee of Bacon and Stoll, was injured on the premises, when he fell from scaffolding used in making the repairs. Plaintiff, without including his employers as parties

defendant, charges that Great Lakes and The Texas Company violated the Illinois Scaffold Act, §§60-69, Ill. Rev. Stat. 1959, Ch. 48, and wilfully committed and permitted scaffolding violations, from which his injuries resulted.

Great Lakes alleges that the scaffolding was erected, owned and controlled by the third-party defendants, and if judgment is entered on the complaint of plaintiff, Paul Kitzkan, it will be based on the active and primary wrongful conduct of the third-party defendants, and any wrongful conduct established on the third-party plaintiff would be passive or secondary; that any such judgment would establish the right of Great Lakes for indemnification from the third-party defendants. Great Lakes asks for judgment against the third-party defendants for the amount of any judgment that may be entered in the original action.

The third-party defendants contend that the complaint of Great Lakes contains only broad, generalized conclusions of law; is ambiguous; fails to state facts to show active and primary misconduct of the third-party defendants, or any duty or breach of duty by them, nor any contract of indemnity nor loss or damage within the terms of the transaction; and, standing alone, it cannot be said to state a cause of action.

The basic question is whether the third-party complaint is substantially sufficient in law. The motion to strike admits only facts well pleaded, and although the instant third-party complaint is construed most strongly against the third-party plaintiff, Great Lakes is entitled to the reasonable intendments of the language used in its

complaint, and it need not allege with precision facts which are within the knowledge of third party defendants rather than Great Lakes. Field v. Oberwortmann, 14 Ill. App. 2d 218.

The Scaffold Act has imposed a duty upon both the contractor and the owner, which is independent of the duty of each other, and neither can escape his statutory liability because of the other's breach of duty. Each is liable to the injured person, regardless of the fault or liability of the other. (Kennerly v. Shell Oil Co., 13 Ill. 2d 431, 436 (1958).) As between the parties, there is nothing in the Act which denies the right of the owner who has been exposed to statutory liability to seek indemnity from the real delinquent, if the contractor is primarily charged with the duty of erecting and maintaining adequate and safe scaffolding. There is an implied obligation by the contractor to perform the contract in a reasonably safe manner and, where necessary, this includes the primary obligation to provide safe and adequate scaffolding for his employees engaged in the contract performance. This principle is fully discussed and set forth in Moroni v. Intrusion-Prepakt, Inc., 24 Ill. App. 2d 534 (1960).

The contention that the statute imposes a nondelegable duty, rendering the owner who breaches the statute an active wrongdoer, without remedy against the one primarily charged with the duty of providing safe and adequate scaffolding in compliance with the Scaffold Act, is without merit. Also, we fail to find valid the suggested Dramshop Act analogy. These contentions are adequately disposed of in Griffiths & Sons Co. v. Fireproofing Co., 310 Ill. 331 (1923), and Moroni v. Intrusion-Prepakt, Inc., 24 Ill. App. 2d 534.

Bacon and Stoll were obligated not only to perform the contractual work, but had an implied obligation to provide proper and safe equipment for the use of their workmen, and if they used scaffolding which failed to meet statutory requirements, and which led to a statutory liability of Great Lakes for injuries to the plaintiff, Paul Kiszkan, then Great Lakes is entitled to indemnity, absent conduct on its part precluding recovery.

We believe the third-party complaint contains sufficient factual information to reasonably inform the third party defendants of the nature of the claim they are called upon to meet, and the facts stated are sufficient in law as a basis to show that Bacon and Stoll are liable to Great Lakes for the amount of any judgment that may be recovered by Kiszkan against Great Lakes.

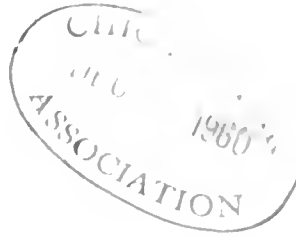
Judgment is reversed and the cause remanded with directions to overrule the motion of third-party defendants to strike the third-party complaint, and for such other and further proceedings as are not inconsistent with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

KILEY, P.J., AND BURMAN, J., CONCUR.

ABSTRACT ONLY.

1537.



Consolidated cases.

CHARLES J. SHEMAITIS,

Appellant,

No. 47896 v.

LE ROY F. FROEMKE,

Appellee.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY

CHARLES J. SHEMAITIS,

Appellant,

No. 47897 v.

CHICAGO TITLE AND TRUST
COMPANY,

Appellee.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY

27 LA 21 480

CHARLES J. SHEMAITIS,

Appellant,

No. 47898 v.

CHICAGO TITLE AND TRUST
COMPANY,

Appellee.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY

MR. JUSTICE McCORMICK DELIVERED THE
OPINION OF THE COURT.

The appeals in the three cases herein are taken from orders of the Circuit and Superior Courts striking plaintiff's complaints and dismissing his suits, and from orders denying plaintiff's motions to vacate the orders of dismissal entered in the three cases. The appeals have been consolidated here. In case No. 47896 Charles J. Shemaitis, hereafter referred to as the plaintiff, brought suit against

LeRoy F. Froemke. In case 47897 and in case 47898 the plaintiff brought suit against the Chicago Title and Trust Company.

For many years the plaintiff has engaged in continuous litigation and has had seven cases in this court, not including the present three consolidated cases, together with two suits in the federal Circuit Court of Appeals, all of them growing out of the same controversy.

These cases all grew out of a suit brought by Louise Shemaitis, at that time the wife of the plaintiff, to partition certain premises in Chicago, Illinois owned jointly with her husband. In that proceeding a decree for partition was entered. Froemke, with the approval of the court, purchased the premises at the judicial sale. While the partition suit was pending, Louise Shemaitis obtained a divorce from the plaintiff in Arkansas. Some five years after the decree in partition had been entered the plaintiff filed a complaint (53 C 12992) against Louise Shemaitis and Froemke in which he asked, first, that the decree of partition and the sale of the premises to Froemke be set aside, and, secondly, that the Arkansas divorce decree be vacated on the ground of fraud. These same two contentions had been raised in a previous suit filed by the plaintiff in which the court found adversely to him and from which finding no appeal was taken. Froemke filed a motion to dismiss the cause involving the partition proceeding as to him. The court dismissed the suit as to Froemke for want of equity and with prejudice, and the premises involved were dismissed from the proceedings. The plaintiff's

motion to vacate this order was denied, and he appealed from the decree dismissing the cause as to Froemke and the order denying his motion to vacate.

A hearing was had with reference to the divorce decree and the court found that Louise at the time the decree was obtained was not a bona fide resident of Arkansas and that the decree was null and void. The attorney for the plaintiff presented a decree to the court in which he included, without the knowledge of the court, a provision that the plaintiff had not in any way relinquished his dower and homestead rights or any other rights he had to the premises in question, and that the plaintiff is entitled to dower and homestead rights and his other rights in and to the said real property and is entitled to possession thereof. Within thirty days after this decree was entered Froemke filed a motion alleging that the decree had affected his rights, and the court stated that under the circumstances he had the right to vacate the decree on his own motion and that the conduct of the attorney for the plaintiff came close to operating a deception on the court. The court thereupon informed the attorney for the plaintiff that if he would prepare a decree vacating the Arkansas decree of divorce without any reference to the Froemke premises in question he would sign it. The attorney refused to present such a decree and the court entered an order vacating the decree in toto. Subsequently the court denied plaintiff's petition to vacate the court's order setting aside the decree, and the plaintiff took separate appeals, one from the order vacating the decree and the order

denying plaintiff's motion to vacate that order, and the other from the decree of the court striking the complaint and dismissing the cause as to Froemke. These appeals were consolidated. The decree and orders in both appeals were affirmed as to Froemke, in Shemaitis v. Shemaitis, et al., 6 Ill. App.2d 324.

Some two years later the plaintiff filed a petition in the trial court with reference to the last referred to case (53 C 12992), in which he asked to have so much of the original decree of the court voiding the Arkansas divorce decree reinstated or to have the trial court enter a new decree declaring the Arkansas divorce decree null and void. The court denied the petition on the ground that it had lost jurisdiction. Thereafter the court denied plaintiff's motion to vacate the order and an appeal was taken from both orders of the trial court. At the time the appeal was taken the attorneys for the plaintiff served notice on the attorneys who had represented Froemke in the case. (Froemke had been dismissed from the case two years before that time.) In the brief filed in the Appellate Court by the plaintiff he alleged that Froemke had been represented by attorneys from the Chicago Title and Trust Company, and that it was on the motion of this corporation's attorney that the decree was vacated in its entirety, and that the court should not have entered such an order on the motion of a stranger to a divorce proceeding or on the motion of one not entitled to intervene. Thereupon Froemke filed a brief in the Appellate Court in which he set up that he was not interested in the branch of the case involved in the appeal but that he



filed a brief because of the fact that he had been served by the plaintiff with a copy of his brief and unwarranted charges were made therein which he deemed advisable to deny. In his brief he further stated that the attorneys who defended Froemke's title did not appear for Louise Shemaitis and did not represent her or her interests directly or otherwise in the litigation, and that the motion made by Froemke's attorneys to vacate the decree of the court was made necessary by the plaintiff's improper conduct in inserting provisions affecting Froemke's title to the real estate without giving notice to Froemke or advising the court of what was being done. Louise Shemaitis filed no brief in the Appellate Court.

The Appellate Court, in Shemaitis v. Louise Shemaitis and LeRoy Froemke, 18 Ill. App.2d 179, reversed the order of the trial court which pertained "to the prior order with respect to the invalid divorce decree in Arkansas" and remanded the case with directions to allow the plaintiff's prayer that the Arkansas divorce decree be held invalid and in all other respects affirmed the order of the trial court.

The plaintiff in the three suits now on appeal before us seeks damages from Froemke and the Chicago Title and Trust Company on the ground that Froemke had through his attorneys reinstated the divorce decree fraudulently obtained by the plaintiff's wife and had resisted plaintiff's efforts to void the fraudulent decree, and in his briefs states that the Chicago Title and Trust Company had "interposed itself in appellant's marital affairs" in reinstating the divorce decree fraudulently obtained by the plain-

tiff's wife. Motions to dismiss were made by Froemke and the Chicago Title and Trust Company, respectively, in the three suits, and in the motions an attached affidavit set up a complete history of the preceding litigation. The grounds alleged in the motions were that the matters were res judicata and that the complaint failed to state a cause of action. The plaintiff filed a counteraffidavit in each case and, after a hearing, the court sustained the motions of Froemke and the Chicago Title and Trust Company to strike the complaints and dismiss the suits. The plaintiff subsequently filed motions to vacate the orders of the trial courts in each of the suits, which motions were denied, and from both of those orders in each suit these appeals are taken.

The course of the litigation indicates that the plaintiff had in his first suit made an attack on the title of Froemke to the premises, which title was insured by the Chicago Title and Trust Company. This attack on Froemke's title runs like a thread of scarlet through all the subsequent litigation. The Chicago Title and Trust Company had a right to defend that title, and it is apparent from the record that it went no further and took no action which was not necessary and proper in the defense thereof. The fact that its attorneys represented Froemke and filed a brief in the appeal in Shemaitis v. Shemaitis and Froemke, decided in 18 Ill. App.2d 179, was justifiable considering the deceptive proceedings pursued by the plaintiff and his counsel in entering a decree which set aside the Arkansas divorce, and in which, without any right under the law, they included provisions affecting

and invalidating the title of Froemke to the premises purchased at the partition sale. The fact that the court vacated the entire decree cannot be attributed to any action on the part of Froemke or the Chicago Title and Trust Company or their respective attorneys. The fault lay solely upon the plaintiff and his attorney. The court gave plaintiff an opportunity to prepare a proper decree and he refused to do so. Instead he took an appeal to the Appellate Court, which appeal was decided against him in 6 Ill.App.2d 324. Under those circumstances, the fact that plaintiff had served a copy of his brief on Froemke's attorneys two years after Froemke had been dismissed from the suit would be sufficient to induce any careful attorney to make an appearance in the case, especially when an attack was made affecting his clients. Accordingly Froemke, through the Chicago Title and Trust Company attorneys representing him, filed a brief in which he disclaimed any interest whatsoever in the question of the validity of the Arkansas divorce. Plaintiff was in no way prejudiced or harmed by Froemke's appearance and disclaimer.

In Shemaitis v. Gallagher, 14 Ill.App.2d 260, the court says:

"In Kaufman v. Goldman, 8 Ill.App.2d 409, we said 'there should be an end to repetitious litigation,' citing Stoll v. Gottlieb, 305 U.S. 165, where it was said:

"'It is just as important that there should be a place to end as that there should be a place to begin litigation.'"

That statement we reiterate.

None of the complaints in the three cases, if we omit from our consideration, as we must, the conclusions therein stated, can in any sense be said to state a cause of action against either Froemke or Chicago Title and Trust Company. The courts'

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orders dismissing the complaints for failure to state a cause of action were proper, as were the courts' orders denying the plaintiff's motions to vacate the said orders. The orders of the Circuit and Superior Courts are affirmed.

Affirmed.

Schwartz, P.J., and Dempsey, J., concur.



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